NO. 80-495

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR. AND SUE FURGER LESTER,
Petitioners

VERSUS

LAURA ANDERSON, EXECUTRIX OF THE ESTATE OF R. C. ANDERSON,
Respondent

ON WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635(b) to effect rescission of a consumer loan under the Truth in Lending Act required to return to the consumer all money received from the consumer and to forfeit to the consumer the balance of the loan proceeds?

II. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635(b) to effect rescission of a consumer loan under the Truth in Lending Act required to pay civil penalties and attorney's fees to a consumer who sues for this violation of the Act?

LIST OF PARTIES

Petitioners: Donald E. Lester, Jr. and Sue Furger Lester, husband and wife.

Respondent: Laura Anderson, Testamentary Executrix of the Estate of R. C. Anderson.

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REFERENCE TO THE OPINIONS BELOW

Anderson v. Lester, 382 So. 2d 1019 (La. App. 3rd Cir. 1980), cert denied 385 So. 2d 790 (La. 1980).

JURISDICTION OF THE COURT

Opinion and decree of the Louisiana Court of Appeal, Third Circuit, were entered in this cause on March 5, 1980. On April 4, 1980, petitioners timely applied to the Court of Appeal for rehearing. On May 5, 1980, the application of petitioners for rehearing to the Court of Appeal was denied.

On June 4, 1980, petitioners timely filed with the Supreme Court of Louisiana, an application for writs of certiorari or review to review the judgment of the Court of Appeal. The Supreme Court of Louisiana denied petitioners' application for writs of certiorari or review on June 23, 1980.

This petition for writ of certiorari is filed within ninety days of the finality of the judgment of the Louisiana Court of Appeal, Third Circuit. Jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. Section 2101 (c). *Department of Banking, State of Nebraska, v. Pink*, 317 U.S. 264, 63 S. Ct. 233, 87 L. Ed. 254, Rehearing denied 318 U.S. 802, 63 S. Ct. 850, 87 L. Ed. 1166 (1943); *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

Respondent filed no motion for rehearing before the Court of Appeal, nor any application for writs of certiorari or review to the Supreme Court of Louisiana. Accordingly, the judgment entered by the Court of Appeal in favor of petitioners on their reconventional demand against respondent is final *Banks v. California*, 395 U.S. 708, 89 S. Ct. 1901, 23 L. Ed. 2d 653 (1969).

APPLICABLE STATUTES AND REGULATIONS

I. Statutes:

15 U.S.C. 1635(a), (b), (f)

15 U.S.C. 1640(a), (e)

28 U.S.C. 2101(c)

LSA - - C.C.P. art. 2166

II. Regulations:

12 C.F.R. 226.9(a), (b), (c), (d),

Federal Reserve Board staff Public Information Letter, May 29, 1975. CCH, *Cons. Cred. Guide*, Para. 31,230 (1974-1977 Trans-Bind.)

STATEMENT OF THE CASE

On January 27, 1975, petitioners entered into a consumer credit transaction with R. C. Anderson, issuing their promissory note of that date payable to the order of Anderson for $77,000, with 10% per annum interest from date. Although the face amount of the note was for $77,000, in fact, the courts below found that petitioners received only $70,000 at the closing, although respondent contended that they they recieved $77,000. This usury aspect of the case under state law is not before the Court on this petition for certiorari.

Petitioners made payments on the note to Anderson of $8,983.28, but were in default on the note when Anderson filed suit on November 18, 1976. By answer and reconventional demand petitioners admitted execution of the note and mortgage, denied any indebtedness to respondent, and averred that Title I of the Federal Consumer Credit Cost Disclosure Act (Truth in Lending Act) and Regulation Z thereunder, applied to the transaction. Petitioners further alleged that Anderson violated the Act and Regulations by failing to make the required credit disclosures, and by failing to inform petitioners of their right of rescission under the Act. By that reconventional demand, petitioners notified their creditor of their exercise of their right of rescission, and made demand against respondent for civil damages, statutory penalties and attorney's fees. An additional defense of usury was asserted under state law.

Anderson answered the reconventional demand of petitioners, denying that the provisions of the Truth in Lending Act and Regulations thereunder applied to the transaction, and asserting that the right of rescission did not apply on the ground that the loan was made for the purpose of financing construction of the Lesters' new dwelling.

On May 5, 1977, Petitioners' attorney mailed to Anderson

a letter stating

> "Pursuant to the provisions of the Truth in Lending Act and Regulation Z thereunder, Donald E. Lester, Jr. and Susan Furger Lester hereby elect to rescind the captioned credit transaction entered into with you on January 27, 1975."

The quoted notice of rescission was furnished to Anderson subsequent to his receipt of judicial notice of rescission in petitioners' original answer and reconventional demand. As noted by the Louisiana Court of Appeal, Third Circuit, following receipt of the notice of rescission of the transaction "[p]laintiff's response was to continue prosecution of his suit for payment." (Appendix "A" p. 4a).

By first amended answer and reconventional demand, petitioners clarified the causes of action asserted under the Truth in Lending Act in the trial court. Anderson, by exception of prescription of one year, sought dismissal in the trial court of petitioners' reconventional demand on the contention that the claims asserted were barred by the statute of limitation of one year in 15 USC 1640(e).

The trial court in an opinion dated June 8, 1979, ruled in pertinent part

> "Plaintiff is indeed in the lending business; he is subject to the Truth and (sic) Lending Act; . . . that the plaintiff is a creditor and defendants are consumers within the Truth and (sic) Lending Act; that the money was used by the defendants for personal, family, household and agricultural purposes; that plaintiff failed to provide defendants with duplicates of the instruments, as required.
>
> It is the reasoning of the Court that defendants are

entitled to rescission under the provisions of 15 U.S.C., et seq., and that the defendants are not liable for that finance or any other charges in connection with this obligation, and the Court finds the note and mortgage void by operation of law.

The federal law also specifies that the plaintiff must forfeit the entire amount of the funds advanced to the defendants in connection with the loan.

Plaintiff's failure to provide defendants with notice of the right of rescission entitles each of the defendants to recover $1,000.00 statutory penalty for plaintiff's failure to make the required disclosures.

Defendants are entitled to return of all interest paid, being the sum of $8,983.28 under the Truth and (sic) Lending Law." (Appendix "C" pp. A-30, A-31).

The Court further awarded attorneys's fees in favor of the Lesters in the sum of $10,000.

Anderson appealed the judgment of the District Court to the Louisiana Court of Appeal, Third Circuit. Petitioners answered the appeal, requesting an increase in attorney's fees and damages.

On March 5, 1980, the Louisiana Court of Appeal, Third Circuit, issued its opinion and decree affirming in part, reversing in part, and recasting the judgment of the trial court (Appendix "A"). The appellate court agreed that the Truth in Lending Act applied to the transaction, that Anderson violated that Act by failing to furnish to petitioners the disclosures and notice of right of rescission required by the Act, and that petitioners were entitled to rescission of the credit transaction and refund of the monies paid to Anderson. But the Court of Appeal reversed that portion of the judgment of the court below, ordering forfeiture by the creditor of the balance of the

loan owed to him by petitioners. The Court of Appeal also reversed the award of civil penalties and attorney's fees in favor of petitioners, finding that the demand for rescission was timely under the Act, but that the demand for attorney's fees and civil penalties was not. Under state law, the Court awarded petitioners $4,000 damages and attorney's fees for Anderson's wrongful sequestration of their property.

On April 4, 1980, petitioners applied to the Court of Appeal, Third Circuit, for rehearing. While that application was under consideration by the Court, respondent, Laura Anderson, executrix of the estate of R. C. Anderson, was substituted as party plaintiff in these proceedings. On May 5, 1980, the application for rehearing was denied. On June 23, 1980, the timely application by petitioners to the Supreme Court of Louisiana for writs of certiorari or review was denied.

ARGUMENT

The questions presented for review by this petition pose significant issues for resolution by the Court under the Truth in Lending Act. Answers to these questions will establish both the correct procedure to be followed by parties to covered credit transactions, and will establish their respective rights and obligations when the consumer elects to exercise his right of rescission granted under 15 USC 1635(b). Substantive conflicts in interpretation of the procedures to be followed, and of the rights and obligations of the parties have developed in the decisions of the Fourth, Fifth and Ninth Circuit Courts of Appeal. And the decisions of all of the Courts of Appeal conflict materially with the interpretation placed on Section 1635(b) of the Act by the Federal Reserve Board Staff. The issues presented are of national importance, and therefore should be resolved by this Court.

I. *A CREDITOR WHO ILLEGALLY REFUSES TO PERFORM THE ACTS REQUIRED BY SECTION 1635(b) TO EFFECT RESCISSION OF A CONSUMER LOAN TRANSACTION COVERED BY SECTION 1635(a) OF THE TRUTH IN LENDING ACT MUST RETURN ALL MONEY RECEIVED FROM THE CONSUMER AND MUST FORFEIT TO THE CONSUMER THE BALANCE OWED ON THE LOAN.*

No issue is presented by this petition of whether the January 27, 1975, credit transaction is covered by the Truth in Lending Act, and subject to exercise of the right of rescission by petitioners. The Courts below determined that R. C. Anderson was a wealthy individual engaged in the business of making private loans at usurious rates of interest under state law. Those Courts found that the loan from Anderson to petitioners was an extension of consumer credit subject to the right of rescission established in Section 1635(a) of the Act:

> "(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, *in accordance with regulations of the Board*, of his intention to do so. The creditor shall clearly and conspicuously disclose, *in accordance with regulations of the Board*, to any obligor in a transaction subject to this

section, the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Borad, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section." 15 U. S. C. 1635(a) (Emphasis supplied)

The Courts below has no difficulty concluding that petitioners were entitled to receipt of notice of their right of rescission of the credit transaction with Anderson, and that since they were never furnished notice of this right of rescission, their exercise of that right less than three years from the date of the loan was timely. 15 USC 1635(f).

Pursuant to Section 1635(a) the Federal Reserve Board by regulation specified the manner in which a debtor may exercise this right of rescission. 12 CFR. 226.9(b). That regulation allows the consumer to exercise his right of rescission by mail or telegram or any other form of written notice identifying the transaction being rescinded, delivered to the creditor at his place of business, dated and signed by the debtor. If the debtor utilizes the notice of rescission form suggested by 12 CFR. 226.9(b), he merely states, "I hereby cancel this transaction."

Section 1635(b) of the Act establishes the sequence to be followed when an obligor exercises the right of rescission, and imposes a creditor forfeiture penalty to encourage self-compliance. That Section states:

> "(b) When an obligor exercises his right to rescind under subsection (a) of this Section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or

otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it." 15 USC 1635(b).

Petitioners timely and properly exercised the right of rescission. Their creditor failed to take any action whatsoever to cancel his mortgage on petitioners' property, or to return to petitioners the monies they paid to Anderson on the loan. This question presents for review the correctness of the decision of the Court of Appeal eliminating the creditor-forfeiture penalty imposed upon Anderson by the trial court.

The Federal Reserve Board staff released a Public Information Letter dated May 29, 1975, explaining its interpretation of the effect of rescission by a debtor under Section 1635(b). CCH, *Cons. Cred. Guide*, Par. 31,230 (1974-1977 Trans. Bind) (Appendix "G"). That Public Information Letter provides. in part:

"In your second question you ask whether the failure of the creditor to return the payments to the customer within ten days entitles the customer to retain the proceeds of the loan without further obligation to the creditor. Where the creditor has delivered property to

the customer, Sec. 226.9(d) provides that he may retain possession of it; only upon the creditor fulfilling his obligations under the subsection is the customer required to make tender of the property to the creditor. *If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and Staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation.*" (Emphasis Supplied).

In *Ford Motor Credit Company v. Milhollin*, _____ U.S. _____, 100 S. Ct. 790, _____ L. Ed. 2d _____, (1980), the Court held that Federal Reserve Board staff opinions are dispositive on questions of interpretation of the Act and Regulation Z. The Court sided with a Federal Reserve Board staff construction of the Act and Regulation Z as imposing no requirement upon creditors to disclose the existence of an acceleration clause. By the role afforded the Federal Reserve Board, this Court found that Congress signalled "an unmistakable congressional decision to treat administrative rule making and interpretation under TILA as authoritative." 100 S. Ct. at p. 798. The Court stated:

> "Courts should honor that congressional choice. Thus, while not abdicating their ultimate judicial responsibility to the determine the law (citations omitted) judges ought to refrain from substituting their own interstitial law making for that of the Federal Reserve so long as the latter's law making is not irrational. *Id.*"

The Court further noted:

> "Because creditors need sure guidance through the 'highly technical' Truth in Lending Act (citations

> omitted), legislators have twice acted to promote reliance upon Federal Reserve pronouncements. . . . . The explicit purpose of the amendment was to relieve the creditor of the burden of choosing 'between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act.' " 100 S. Ct. at p. 797.

This Court concluded that deference to the Federal Reserve Board is compelled by necessity, stating that

> ". . .[A] court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views. . . ." 100 S. Ct. at p. 798."

The decision of the Louisiana Court of Appeal in reversing the trial court imposition of the creditor-forfeiture penalty upon respondent in this cause, adopted an interpretation of Section 1635(b) in direct conflict with the interpretation of the Federal Reserve Board staff in the quoted Public Information Letter. The agency's view is clear

> "If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and the Staff is of the opinion ***that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation.***" (Emphasis supplied).

The Louisiana Court of Appeal has rejected the agency view and determined that the creditor in this cause shall have the benefit of a debtor tender of the loan proceeds at such time as the creditor hereafter complies with its judicial mandate to

effect rescission. That decision will afford this creditor nearly four years within which to complete the acts evidencing rescission, without penalty of forfeiture for his violations of the Act. This result does not encourage creditor self enforcement.

In *Sosa v. Fite*, 498 F. 2d 114 (5th Cir. 1974), the plaintiff contracted with "a home improvement contractor of dubious repute. . .to provide and install aluminum siding on her house." 498 F. 2d at p. 116. The contractor arranged for financing, including the creation of a security interest in the plaintiff's home. Neither the contractor nor the lender provided the plaintiff with the required Truth in Lending Act disclosures, including the notice of right of rescission. Disenchantment with the contractor's work culminated in plaintiff's termination of the payments to the lender, who foreclosed on its security interest in the realty and sold plaintiff's property to a third party. Plaintiff rescinded the transaction by notice to the contractor and lender, who took no responsive steps to undo the transaction. Sosa sued and was awarded rescission in the trial court, but that court entered judgment in favor of the creditors against the plaintiff for the balance of the contract price, less interest, after credit for plaintiff's payments, and impressed her property with a judgment lien to secure that balance. This same order was entered in the instant case. Plaintiff in *Sosa* appealed, contending that the failure of the defendant to rescind the transaction within ten days of receipt of notice relieved her of the obligation to pay the balance of the indebtedness.

The Court stated at 498 F. 2d 118:

> "Under the provisions of Section 1635(b), when the debtor exercises the rescission right, he is no longer liable for any finance or other charge, and any security interest acquired by the creditor in the debtor's residential realty becomes void. At this juncture, the creditor incurs several responsibilities. Within ten days after

receipt of a rescission notice, the creditor is obligated, first, to return any downpayment or earnest money, and second, to take any appropriate steps to reflect the termination of the security interest. According to the statute, '[u]pon the performance of the creditor's obligations' in this regard, the debtor shall tender to the obligee either the property or the reasonable value thereof if return of the property would be inequitable or impracticable."

The Court noted that "included in Sosa's notice of rescission was an express offer to return the aluminum siding, an overture which elicited no response whatsoever from the creditors," and that neither of the creditors "ever performed their statutory obligations imposed by Section 1635(b) since, for one, they utterly failed to take any steps to reflect termination of the security interest in Sosa's property." 498 F. 2d at p. 118.

The creditors resisted plaintiff's demand for forfeiture of the balance of the loan contending that the plaintiff was obligated to return the creditors to the status quo ante by tender of return of the loan proceeds. The Court's analysis of this creditor defense is incisive:

> "It is true that the statute contemplates an orderly progression of specific events, culminating in the debtor's tender and the creditor's recoupment, which never came to pass in this case. Specifically, Section 1635(b) envisions responsive action on the creditor's part to a rescission notice, after which the debtor then becomes obligated to tender either the property or a sum reflecting its reasonable value. This precise statutory scheme was aborted in this case due to the creditors' failure to comply with statutory requirements, ***hence Sosa's responsibility to make the specific statutory tender was excused by the creditors' omissions.***

To hold otherwise would create a gross anomaly, for no tender in the exact scheme envisioned by the statute could ever be effected by a debtor in the most egregious of circumstances, namely when a creditor steadfastly refuses to perform his express obligations upon receiving the notice of rescission. Congress scarcely could have contemplated such a disruptive commercial stand-off. We therefore conclude that under the circumstances of this case, the debtor's obligation to restore the creditor to the status quo ante was discharged by an offer accompanying notice of rescission, since the creditor within ten days of notification failed to return all monies previously paid by the debtor, or to reflect dissolution of the security interest.

. . .

Congress' intended operation of the statute, as evidenced by the 1635(b) creditor-forfeiture provisions, therefore clearly calls for a debtor windfall if the creditor does not set about to rectify his earlier nondisclosures in the manner envisioned by the statute. In fact, the Act flatly provides that if his creditor continues in his untoward ways, the debtor incurs no obligation to pay for property which he is at the same time entitled to keep. That this result was intended is clear beyond peradventure, for one of the measure's principal sponsors in the House stated: '[I]f the seller does not come back to pick up [his property] after a 10-day period [following the notice of rescission], the buyer can keep this item and he does not even have to pay for it. . . .' 114 Cong. Rec. 14398 (1968) (remarks of Congresswoman Sullivan)." 498 F. 2d at pp. 119, 120. (Emphasis supplied.)

Thus, in *Sosa*, the Court held that where a debtor accompanies his notice of rescission with an expression of willingness to return the property acquired in the credit transaction, or "tenders" such return, and the creditor fails to take the steps required by the Act to reflect the rescission, the debtor is thereafter relieved of any obligation to return the property, or to pay the balance of the loan. The Court noted, however, that "under a literal reading of the statute the creditors were unentitled to any tender at all by virtue of their failure to perform their express obligation. . . ." 498 F. 2d at p. 118. It is also important to note that Sosa did not make an actual "tender" at the time of notice of rescission, for all she offered to return was the aluminum siding on her house, with no mention of tender of the balance due on the loan transaction, or the reasonable value of the work performed in putting the siding on her house. Thus she did not, in fact, make a tender:

> ". . .the word 'tender' is defined as an unconditional offer of payment consisting in the actual production, in current coin of the realm, of a sum not less than the amount due on a specific debt or obligation. This is the common-law definition of tender, and except as modified or qualified by statute, the definition is generally applicable." 74 Am Jur. 2d Tender, Sec. 1.

From the decision in *Sosa*, it is apparent that the Court's characterization of the plaintiff's willingness to return the siding to the creditors as a "tender" was dicta, since the Court expressly held that "Sosa's responsibility to make the specific statutory tender was excused by the creditors' omissions." Nevertheless, in later deicsions of the Fifth Circuit, that Court has now imposed a requirement that the consumer tender return of all property received from the creditor, including any balance due on the credit transaction, at the time the creditor is notified of the exercise by the consumer of his right of rescission, as a condition precedent to imposition of creditor forfeiture. *Gerasta v. Hibernia National Bank*, 575 F. 2d 580 (5th Cir. 1978); *Harris v. Tower Loan of Mississippi, Inc.*, 609 F. 2d

120 (5th Cir. 1980); ***Bustamante v. First Federal Savings & Loan Association***, 619 F. 2d 360 (5th Cir. 1980).

In ***Gerasta***, plaintiffs received a home improvement loan from the defendant, secured by a second mortgage on their home. Discovering that the bank had not made all the material disclosures required by the Act, plaintiffs exercised their statutory right of rescission. The bank failed within ten days of receipt of notice of rescission to return to plaintiffs all money received from them, and to take the necessary actions to reflect termination of the bank's security interest created by the second mortgage on the plaintiffs' property. The District Court rescinded the transaction and held that the creditor forfeited its right to recover the property delivered to the obligors because of its failure to perform those duties. The Court of Appeal reversed on the issue of creditor forfeiture. The Court agreed that the plaintiffs had properly rescinded the transaction, but held that since they had failed to tender the loan proceeds to the bank, the creditor forfeiture provisions of Section 1635(b) did not apply. The Court stated:

> "Section 1635 does not expressly provide a remedy for the situation in which the creditor fails to take any action upon receipt of a rescission notice, and the consumer does not tender the creditor's property." 575 F. 2d at p. 583.

Although the court in ***Sosa*** held that the consumer's responsibility to make a specific statutory tender was excused by the creditors' omissions, because "Congress could scarcely have contemplated such a disruptive commercial stand-off," in ***Gerasta*** the Court concluded that Congress did intend such a stand-off.

In ***Harris v. Tower Loan of Mississippi, Inc., supra***, the creditor failed to perform its obligations after receipt of notice

of rescission. The trial court cancelled the transaction, ordered forfeiture on the part of the creditor, and awarded statutory penalties and attorney's fees. The Court of Appeal again revversed that portion of the judgment of the court below that ordered creditor forfeiture of the balance of the loan indebtedness to plaintiff, apparently on the basis that plaintiff had not tendered a teturn of those loan proceeds to the creditor. The Court allowed the rescission to stand, and rejected the creditor's contention that rescission also should be conditioned upon tender of return of the loan proceeds by the obligor. To the same effect is the Court's decision in ***Bustamante v. First Federal Savings & Loan Association, supra.***

The Fifth Circuit's rule in the decisions since *Sosa* requiring consumer tender as a precondition to creditor forfeiture for noncompliance with the requirements of Section 1635(b) is in violation of the literal language of Section 1635(b), and the Congressional mandate that rescission be effected "in accordance with regulations of the Board." Section 1635(a). As quoted above, 12 CFR 226.9(b) allows rescission by the consumer statement, "I hereby cancel this transaction," without mention of tender.

At least two courts which have adopted the rule of law enunciated in *Sosa* with respect to creditor forfeiture have applied that rule in the absence of a prior consumer tender. The Supreme Court of Colorado, in ***Strader v. Beneficial Finance Company of Aurora,*** 551 Pac. 2d 720 (1976), construes Section 5-5-204(2) of the Uniform Consumer Credit Code, which is identical to Section 1635(b) of the truth in Lending Act, in the same manner Section 1635(b) is interpreted by the Federal Reserve Board Public Opinion Letter of May 29, 1975 quoted above. In *Strader*, the creditor failed to make a material disclosure to the plaintiffs in connection with a credit transaction secured by a second deed of trust on the Strader's residence.

Following notice of rescission, the creditor took no steps to rescind the transaction. The Court discussed the reasons for the creditor forfeiture provision:

> "The creditor is required to remove the cloud on the title of the debtor's residence within ten days. Then and only then is the debtor obligated to tender. After tender by the debtor, if the creditor fails to take possession of the property tendered, 'ownership of the property vests in the debtor without obligation to pay. . . .' ***We hold that this statutory provision is intended as an impetus for the creditor to take immediate action to clear title and to fulfill its obligations. If not interpreted in this way, there is no stimulus for the creditor to comply with the statutory provisions requiring him to release the security interests within the ten day period.***
>
> ***Sosa v. Fite***, 498 F. 2d 114 (5th Cir. 1974), supports our holding. . . .
>
> We hold, as did the Court in ***Sosa***, supra, that the requirement of tender arises only after the security interest is released. If it is not released within the ten days following notice of rescission, the debtor is relieved of the obligation to tender and the property vests in the debtor." (Emphasis supplied.)

In ***French v. Wilson***, 446 F. Supp. 216 (U.S.D.C. R. I. 1978), that Court adopted the rule of creditor forfeiture in the event the creditor fails to rescind the transaction within the ten days required by the Act, rejecting the rule of ***Palmer v. Wilson***, 502 F. 2d 860 (9th Cir. 1974), discussed below, which imposes consumer tender as a precondition to the right of rescission itself.

The decision of the Fifth Circuit in ***Sosa*** is in accord with the Federal Reserve Board interpretation of the rescission process,

and with the literal language of Section 1635(b). Perhaps that Court's retreat from its holding in ***Sosa*** was prompted by later decisions of the Ninth and Fourth Circuits.

In ***Palmer v. Wilson***, 502 F. 2d 860 (9th Cir. 1974), decided two weeks after ***Sosa v. Fite, supra***, the Ninth Circuit first considered the rescission and forfeiture provisions of Section 1635(b). Plaintiffs borrowed $9,300 from defendants secured by a deed of trust on their home. The proceeds of the loan were disbursed to the benefit of plaintiffs by defendant. Five and one-half months later, plaintiffs notified defendants of the exercise of their right of rescission. See, 359 F. Supp. 1099. The creditors did not comply with their obligation to rescind the transaction, and plaintiffs sued. The trial court declared the deed of trust on plaintiffs' property void, enjoined sale of their property, and awarded plaintiffs $1,000 in civil penalties and $4,400 attorney's fees under Section 1640(a) of the Act.

The Court of Appeal vacated the judgment of the trial court and remanded the cause for further proceedings. The Court, although recognizing that a consumer is entitled to pursue both rescission of a credit transaction under Section 1635(b), and civil penalties and attorney's fees under Section 1640(a), found, on the basis of equitable considerations, that it had the power to ***condition rescission*** of the credit transaction on the debtors' prior tender of the loan proceeds to the creditor:

> ". . .the court may condition the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received." 502 F. 2d at p. 862.

The dissenting opinion correctly observed:

> "Section 1635(b) provides that upon the debtor's election to rescind, the creditor's security interest in the debtor's home becomes ***void***. There is no requirement that the debtor tender payment before rescission.

> Nor is there a provision that the security interest is merely voidable by petitioning the district court. Thus, when the plaintiffs exercised their right to rescind by notifying the defendants, the security interest automatically became void and unenforceable.
>
> The majority opinion would permit the district court effectively to reinstate the security interest that Section 1635(d) (sic) declares void, at least as it affects the rights of the debtor and creditor *inter se*. If rescission is conditioned on repayment and if the plaintiffs do not repay, the security interest would presumably still be in force. This is in direct conflict with Section 1635(b). Indeed, conditioning the voiding of a security interest on repayment is effectively no remedy at all because, after repayment, the security interest has fulfilled its purpose and has lost its vitality.
>
> Although the majority speaks of conditioning rescission on payment, the remedy might be interpreted to mean merely that plaintiffs' obligation to repay the principal can be incorporated into the judgment of the district court and enforced by a court imposed lien. This would rescind the security interest, but the defendant would become a judgment creditor with a court imposed lien on plaintiff's home. It would alter the creditor's rights vis-a-vis third-party creditors, but it would permit the defendants to foreclose in the event of nonpayment." 502 F. 2d at p. 863 (Emphasis in original).

The rule announced in *Palmer v. Wilson* that a "court may condition the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received," has been applied on numerous occasions by district courts within the Ninth Circuit, and has been reiterated by that Court in its later decisions in *Ljepava v. M. L. S. C. Properties, Inc.*, 511 F. 2d 935 (1975),

and *LaGrone v. Johnson*, 534 F. 2d 1360 (1976).

The violence this rule inflicts on the letter and spirit of Section 1635(b) is demonstrated in *Ljepava*. There the plaintiffs, two brothers with eighth grade educations, lived in a 5-room house on a 15-acre prune farm inherited from their parents. Their property was located in an area of new residential development, and had a market value of approximately $225, ooo. In order to refinance a second deed of trust on their property, which was in default, plaintiffs borrowed $36,000 from defendants, secured by a deed of trust on the property. Of the $36,000, $24,480 was paid on behalf of the Ljepavas, and $11,520 was paid in commissions to loan brokers for "finding" the loan. The loan was for one year at 10% interest, or $3,600, plus other charges. When the Ljepavas defaulted in payment, defendant recorded a notice of default and proposed to sell their property at foreclosure sale. Plaintiffs sued for injunction to restrain the sale, for rescission of the transaction, and for civil penalties and attorney's fees under the Truth in Lending Act. A preliminary injunction issued prohibiting the sale. At trial, the Court found that the Act had been violated and awarded plaintiffs civil penalties and attorney's fees.

> "In addition, the district judge held that plaintiffs could rescind the loan contract if plaintiffs tendered to defendants, within ten days, an amount equal to the proceeds of the loan disbursed to them or for their account ($24,480) plus the amounts subsequently advanced by defendants to the holders of the first deed of trust ($8,681.49).
>
> At the expiration of the ten-day period provided in the court's order, the defendants moved to dissolve the preliminary injunction against holding a foreclosure sale on the ground that the plaintiffs had failed to avail themselves of the court's rescission order . . .

While there is no evidence in the record concerning events subsequent to the trial, it appears that within the ten-day period in question, the Ljepavas had finalized arrangements to sell their property to Anthony Cansano for $180,000 and that an escrow account had been set up to facilitate the sale. It appears that defendants refused to agree to release their mortgage subject to the subsequent payment to them of $33,161.49 from the escrow account. Instead they apparently maintained that the rescission order permitted them to insist upon payment prior to their release of the mortgage. The trial judge, concluding that plaintiffs had failed to tender in accordance with his rescission order, dissolved the injunction and cancelled the award of the attorney's fees. . . .

Within three weeks after the post-trial hearing, it appears that the Ljepavas successfully completed the sale of their property for $180,000, and paid the defendants $67,356.62 so that they would release their deed of trust. Of the amount paid defendants, $33,161.49 represented the amount which would have been payable under the court's order; the remainder covered, inter alia, the commissions to HLC Financial and Paulson Mortgage of $11,520.00, a prepayment penalty of one year's interest ($3,600), and attorney's fees of $10,000." 511 F. 2d at pp. 939, 940.

The Court of Appeal held that tender by the debtors of the full amount of the loan proceeds within the ten-day period set by the Court below was not a mandatory requirement for rescission, and in view of the egregious violations of the Act by the defendants,

". . .the district court should have provided a more liberal remedy for the Ljepavas. . . . ***The least the court should have done when it appeared that there was a factual dispute over whether tender had been made***

[by the Ljepavas] ***within the ten-day limit it had imposed was to hold a hearing to determine what actually had happened.***" 511 F. 2d at p. 944. (Emphasis supplied)

The refusal by the Ninth Circuit to apply the literal language of Section 1635(b) has repeatedly frustrated the purposes of the Act, and has created debtor hardship, as in *Ljepava*. As explained in the lengthy quote from that case, the debtors were required to sell their home in order to meet the Court's requirement of tender as a condition precedent to rescission of the transaction. Had the Act been followed, and the security interest in their home removed from the public records by the creditor within the ten-day period provided by the Act, the Ljepavas would have been able to refinance the indebtedness in view of the substantial equity in their property. Instead, they were required to sell their property within ten days at a $45,000 loss, trying to place themselves in a position to tender the balance of the loan proceeds to their creditor. The outrageous result in *Ljepava* follows from the rule of law extant in the Ninth Circuit that the debtor must tender all to the creditor as a condition of rescission. That Court never has had occasion to pass upon the issue of creditor forfeiture, apparently because debtors in the Ninth Circuit cannot clear the initial hurdle of tender of all loan proceeds and property received from the creditor as a condition precedent to rescission of a credit transaction. Unless rescission is effected, there can be no creditor forfeiture. 15 USC 1635(b).

The Fourth Circuit has also adopted a rule requiring consumer tender as a condition to exercise of the right of rescission. *Powers v. Sims and Levin*, 542 F. 2d 1216 (4th Cir. 1976). There the Court stated;

> "The district court, and we, exercising traditional equity powers, ***may condition the borrower's continuing right of rescission upon their tender to the lender of***

> ***all of the funds spent by the lender in discharging the earlier indebtedness of the borrowers as well as the value of the home improvements.***

Concerning creditor forfeiture of the value of the funds advanced on behalf of the debtors the dissent asserted:

> ". . .in my view, the application of general contract law principles leads to the conclusion that the performance of the condition of tender [by the debtor] has been wxcused, because the defendant prevented its performance by failing to carry out its antecedent duties under the statutory scheme (return of payments and release of security interest within ten days of rescission)."

The dissent in ***Powers v. Sims and Levin*** expounded upon the basis for the holding of the Court in ***Sosa v. Fite***, supra, that actual tender to the creditor of return of money or property received by the debtor is excused by creditor default in effecting rescission. It is interesting to note that the results in ***Sosa*** and ***Powers*** are diametrically opposite, although the facts surrounding the debtors' executions of their respective notices of rescission are not distinguishable. In ***Sosa***, the plaintiff's offer to return a part of the consideration for the loan transaction was considered a full tender of performance, and in ***Powers***, similar language was interpreted as an "anticipatory breach" of an obligation to tender.

The Courts of Appeal are in error in relying upon their equitable powers to require debtor tender prior to rescission and/or creditor forfeiture. This Court has previously determined that the remedies provided by the Act are quasi-penal in nature. ***Mourning v. Family Publication Service, Inc.***, 411 U.S. 356, 376; 93 S. Ct. 1652, 1664, 36 L. Ed. 2d 318 (1973). The Court stated at 93 S. Ct. 1665:

> "That the approach taken may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. The statutory scheme is within the power granted to Congress under the Commerce clause. It is not a function of the courts to speculate as to whether the statute is unwise or whether the evil sought to be remedied should better have been regulated in some other manner."

The requirement of debtor tender engrafted by the Fourth and Ninth Circuits on the Section 1635(b) right of rescission has effectively eliminated that right as a means of debtor relief and incentive for creditor self-enforcement of the disclosure provisions of the Act. A creditor in receipt of notice of rescission from a debtor not accompanied by a debtor tender of all proceeds from the credit transaction would be foolish indeed to take the steps required by Section 1635(b). As pointed out by the dissent in ***Palmer v. Wilson***, supra, by refusing to rescind and litigating all issues, a creditor can, at worst, convert his conventional security interest in the debtor's property to a judicially imposed lien without fear of loss of the loan proceeds or other property advanced to the obligor. Possibly the only creditor in jeopardy of forfeiture is one who attempts unsuccessfully to complete rescission within ten days.

The Federal Reserve Board interprets Section 1635(b) literally, and requires no debtor tender as a condition to rescission or creditor forfeiture. This interpretation of Section 1635(b) by the Board is not "demonstrably irrational." ***Ford Motor Credit Company v. Milhollin, supra***, at p. 797. Accordingly, the "unmistakable congressional decision to treat administrative rule making and interpretation under TILA as authoratative," 100 S. Ct. at p. 798, should be honored and that agency's interpretation adopted by this Court as controlling.

II. *A CREDITOR WHO ILLEGALLY REFUSES TO PERFORM THE ACTS REQUIRED BY SECTION 1635(b)*

TO EFFECT RESCISSION OF A CONSUMER LOAN IS LIABLE FOR CIVIL PENALTIES AND ATTORNEY'S FEES TO A CONSUMER WHO FILES SUIT WITHIN ONE YEAR FROM THE DATE OF THE OCCURRENCE OF THE VIOLATION

The Louisiana Court of Appeal, Third Circuit, ruled that petitioners' right to statutory penalties and attorney's fees prescribed under the time limitation imposed by 15 USC 1640(e), and therefore reversed the judgment of the trial court awarding petitioners $1,000 each in civil penalties, and attorney's fees of $10,000.

The credit transaction occurred on January 27, 1975. None of the disclosures required by the Act were ever made by Anderson. In February, 1977, petitioners notified Anderson by reconventional demand of their exercise of the right of rescission, and additionally asserted their claims for civil penalties and attorney's fees. This judicial notice of rescission was followed by a letter of notification on May 5, 1977, two years and four months after the date of the loan.

Section 1635(f) of the Act establishes a three year statute of limitations on the action for recission: Section 1640(e) establishes a one year statute of limitations on the action for civil penalties and attorney's fees, "from the date of the occurrence of the violation."

As originally enacted, Section 1640 provided for civil penalties and attorney's fees only for violations of disclosure requirements. Congress amended Section 1640(a) in 1974 to make the current provisions for damages, civil penalties and attorney's fees applicable to any creditor who violates *"any requirement"* of Sections 1631 to 1645 of the Act. ***Gerasta v. Hibernia National Bank, supra,***

Anderson's failure to cancel his mortgage and return the

monies paid by petitioners within ten days of receipt of petitioners' notice of exercise of their right of rescission was a violation of the Act giving rise to a right in petitioners to civil penalties and attorney's fees, which was asserted timely.

CONCLUSION

At least three conflicting interpretations of the requirements for rescission and creditor forfeiture under Section 1635(b) have evolved in the jurisprudence of the federal Courts of Appeal and one state court of last resort. Confusion engendered by the conflicting interpretations of this Section by the Courts of Appeal has afflicted many of the decisions under that Section. These conflicting results harm significant state and federal interests in creating certainty and uniformity of expectations under the Truth in Lending Act.

Petitioners respectfully suggest to this Honorable Court that the interpretation of Section 1635(b) adopted by the Federal Reserve Board most nearly reflects Congressional intent in adopting that Section, and should be approved by the Court in this case. The Board's interpretation fosters the Act's purpose of safeguarding the consumer in connection with the utilization of credit by encouraging creditor self enforcement. The decisions of the Courts of Appeal have effectively eliminated creditor forfeiture as a self enforcement mechanism under the Act.

In choosing to reverse the trial court, the Louisiana Court of Appeal, Third Circuit, disregarded the Federal Reserve Board's interpretation of Section 1635(b) in favor of the more restrictive interpretation of the Fifth Circuit Court of Appeal in *Gerasta v. Hibernia National Bank, supra.* In so doing, that Court also disregarded this Court's instructions to courts in *Ford Motor Credit Company v. Milhollin, supra,* to follow Federal Reserve Board interpretations of the Act. The rule of law in Louisiana is now contrary to the Board's interpretation

of Section 1635(b).

The appropriate time and vehicle for review by the Court of the mechanics of rescission and of the respective rights and obligations of the parties to rescinded credit transactions are presented by this petition for writ of certiorari on behalf of Donald E. Lester, Jr. and Sue Furger Lester. We respectfully request that the writ issue.

BY ATTORNEYS:

GOLD, LITTLE, SIMON, WEEMS & BRUSER

By_____

Henry B. Bruser III
2001 MacArthur Drive
P. O. Box 6118
Alexandria, Louisiana 71301
(318) 445 - 6471

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that three copies of this petition for writ of certiorari have been served upon respondent, Laura Anderson, Executrix of the Estate of R. C. Anderson, by depositing same in the United States Mail with first-class postage prepaid and properly addressed to her attorney of record, Russell E. Gahagan, Gahagan and Gahagan, Attorneys at Law, Post Office Box 70, Natchitoches, Louisiana 71457.

Alexandria, Louisiana, this _____ day of September, 1980.

Henry B. Bruser III

APPENDIX A

NUMBER 7463

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

R.C. ANDERSON

Plaintiff & Appellant

VERSUS

DON LESTER, ET UX

Defendant & Appellee

Appeal from the Tenth Judicial District Court for the Parish of Natchitoches, Judge Peyton Cunningham, Jr. Presiding

Before Culpepper, Guidry and Doucet, Judges
Culpepper, Judge

This is a suit for payment of a promissory note and for recognition of a mortgage on immovable property. Plaintiff, R. C. Anderson, holds the promissory note, dated January 27, 1975, in the principal amount of $77,000. Defendants, Donald E. Lester and Suzanne F. Lester, are makers of the promissory note secured by the pledge of a collateral mortgage note, which in turn is secured by the mortgage on their home and two non-contiguous lots. The defense is violation by plaintiff of the provisions of 15 USC 1601, et seq., The Truth in Lending Act, (the Act), and certain Federal regulations issued pursuant thereto. In the alternative, defendants urge usury. Defendants also filed a reconventional demand for damages and attorney's fees under the Act.

Trial of the matter was initiated on June 2, 1977, at which

time an exception of prescription of one year under Section 1640(3) of the Act was filed by plaintiff. After one day of trial, the case was continued. During the continuance, plaintiff caused a writ of sequestration to issue, seizing the mortgaged property. Plaintiff then filed a second suit against defendants and the sheriff to take physical possession of the property. Trial of the case continued on April 10-11, 1978, the parties stipulating that both pending suits, plaintiff's re-urged exception of prescription and defendants' subsequent motion to dissolve the writ of sequestration would be heard together. Trial was again continued to May 27, 1979, at which time it was completed.

With written reasons, the trial judge dismissed plaintiff's demands. He granted defendants' reconventional demand for rescission of the transaction, cancellation of the mortgage, damages and attorney's fees under the Act. The trial judge also ordered a forfeiture of the money loaned. The trial court opinion makes no reference to plaintiff's exception of prescription, or to plaintiff's second suit or to defendants' motion to dissolve the writ of sequestration.

The issues on appeal are whether the trial court erred: (1) in applying the Act; (2) in ordering the forfeiture of the loan proceeds; (3) in awarding damages and attorney's fees under the Act, despite the one-year prescriptive period; and (4) in failing to award damages and attorney's fees for wrongful issuance of the writ of sequestration.

FACTS

In late 1974, defendant Lester was experiencing financial difficulties. His business operations, a trucking firm known as Delta Express, Inc., and a feed mill, were heavily indebted. Lester was personally obligated on many of the business debts, as well as three Federal tax liens, the largest of which arose out

of an assessment of estate taxes on Lester's father's estate. Defendant feared the immediate loss of his one unencumbered asset, his home. To pay off the most pressing creditors, defendant sought to obtain another loan.

Plaintiff is a wealthy individual who makes private loans. On January 27, 1975, plaintiff and defendant, accompanied by defendant's attorney, met at the office of plaintiff's attorney to complete a loan transaction. Mr. Lester also came to the office for a brief moment to sign the appropriate documents. Both attorneys left the room while plaintiff and Donald Lester reached a final agreement. There is no contention that any notices or disclosures required under 15 USC 1601, et seq, were made by plaintiff.

The plaintiff testified that he gave defendant $7,000 in cash and $70,000 by check or money order, making a total of $77,000 loaned, represented by a demand note bearing interest at the rate of 10% per annum from date, secured by a collateral mortgage note payable in monthly installments. Defendants admit signing the note for $77,000 but deny that they actually received more than the $70,000 money order. According to defendants, the $7,000 was additional interest on the loan. Defendants' attorney deposited $70,000 in a trust account. Records of the disbursement show that part of the funds were used to pay personal debts and part were used for business debts.

Defendant paid a total of $8,983.28 on the loan and then ceased payment. Plaintiff filed this suit on November 18, 1976 and obtained a default judgment, which was later set aside. On May 5, 1977, defendants' attorney mailed to plaintiff a letter stating:

> "Pursuant to the provisions of the Truth in Lending Act and Regulation Z thereunder, Donald E. Lester, Jr. and Suzanne Furger Lester hereby elect to rescind

the captioned credit transaction entered into with you on January 27, 1975."

Plaintiff's response was to continue prosecution of his suit for payment.

APPLICATION OF 15 USC 1601, ET SEQ.

The following definitions provided in 15 USC 1602 are applicable:

> "(e) The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
>
> "(f) The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.
>
> * * *
>
> "(h) The adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

15 UCS 1603 sets forth the following pertinent exemptions from the Act:

> "This subchapter does not apply to the following:
> "(1) Credit transactions involving extensions of credit

for business or commercial purposes,

* * *

"(3) Credit transactions, other than real property transactions, in which the total amount to be financed exceeds $25,000."

Section 1631 of the Act provides in part:

"Disclosure requirements - Clear and conspicuous disclosure to person extended consumer credit

"(a) Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended, the information required under this part or part D of this subchapter.

" Statement of information where more than one obligor

"(b) If there is more than one obligor, a creditor need not furnish a statement of information required under this part or part D of this subchapter to more than one of them."

Plaintiff's response was to continue prosecution of his suit for payment.

APPLICATION OF 15 USC 1601, ET SEQ.

The following definitions provided in 15 USC 1602 are applicable:

"(e) The term 'creditor' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

"(f) The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

* * *

"(h) The adjective 'consumer' used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property,, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

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" Statement of information where more than one obligor

"(b) If there is more than one obligor, a creditor need not furnish a statment of information required under this part or part D of this subchapter to more than one of them."

The plaintiff argues that the Act does not apply in this case for two reasons: First, because the transaction is exempt under Section 1603(1) and, second, because plaintiff is not a "creditor" as defined in Section 1602(f).

EXEMPTIONS UNDER THE ACT

In determining whether a particular transaction falls within the Act, the court in Sapenter v. Dreyco, Incorporated, 326 F. Supp. 871 (E. D. La. 1971), affirmed 450 F. 2d 941 (5th Cir. 19) gave the following analysis of the issue:

"Not all credit transactions are covered by the Truth In Lending Act, however, and the Act expressly provides that it does not apply to [c]redit transactions involving extensions of credit for business or commercial purposes * * *.' 15 U.S.C. Sec. 1603(1).

* * *

"Furthermore, the Truth In Lending Act was enacted as part of the Consumer Credit Protection Act of 1968, and specifically deals only with consumer credit trans-

> actions, characterized as 'one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for ***personal, family, household, or agricultural purposes***.' 15 U.S.C. Sec. 1602(h). (Emphasis added)
>
> * * *
>
> "In determining whether a particular transaction is exempt, therefore, the purpose of the transaction or extension of credit is controlling, not the property on which the security interest is retained. . . ."

Accordingly, the first issue here is to determine whether the loan transaction is to be characterized as having a business or commercial purpose, or whether the loan is to be deemed a transaction within the comprehension of the Truth In Lending Act. Plaintiff contends that the use of part of the funds for business debts rendered the business exemption applicable. Defendant contends that the laon should be characterized according to the purpose for which the money was borrowed or most funds actually used, which, under defendants' calculations, went toward personal and agricultural debts. Defendant is supported by Smith v. Chapman, 436 F. Supp. 58 (W. D. Tx. 1977), where the federal court applied the Act to a transaction in which the plaintiff purchased an automobile primarily for her personal use, even though the vehicle was also used incidental to plaintiff's business. In doing so, the court stated:

> "[1, 2) The Act is aimed at providing consumers with information in order to be able to intelligently shop for credit. 15 U.S.C. Sec. 1601, Mourning v. Family Publications Service, Inc. 411 U.S. 356, 93 S. Ct. 1652 36 L. Ed. 2d 318 L9730). A 'consumer credit' transaction is one in which the credit is given 'primarily for personal, family or household purposes.' (emphasis

added) 15 U.S.C. Sec. 1602(h); 12 C.F.R. Sec. 226.2 (p). The term 'business credit' is not defined but since the purpose of the Act is to provide information in 'consumer credit' transactions, then it must be clear that business credit is something other than credit given primarily for personal, family or household purposes.

"It stands to reason that the business credit exemption arises whenever the credit is given primarily for a business purpose and not just when the credit is given entirely for a business purpose. On the other hand the Act applies when the credit is given primarily for a personal, fanily or househouse use and not just when it is given entirely for a personal, family or household use."

We find even more persuasive support for defendants' position in the case of Gerasta v. Hibernia National Bank, 411 F. Supp. 176 (E. D. La. 1976), affirmed in part, reversed in part 575 F. 2d 570 (5th Cir. 1978). In that case, the court applied the Act to a transaction in which the debtor had used the acquired funds for the purpose of repairing and/or improving property which initially was rented but "ultimately" was intended to be the debtor's home. This attention to the debtor's ultimate purpose is consistent with the usual liberal construction of the Act in favor of the debtor. Sellers v. Wollman, 510 F. 2d 119 (5th Cir. 1975).

In the present case, the evidence clearly shows that the defendants' purpose in entering into this transaction was to prevent a seizure on their home. The defendants testified that they were motivated to seek a loan after being examined by the attorney for a judgment creditor, Natchitoches Collections, Inc., who informed defendants that their home would be seized. The funds were applied to selected debts which represented the most immediate threats to the security of

their home. Furthermore, both plaintiff's testimony, and correspondence from defendants' attorney show that plaintiff was made aware of defendants' concern for their home and the purpose of the loan.

We conclude the transaction was not one for business or commercial purposes and is not exempt under Section 1603(1).

"CREDITOR" UNDER THE ACT

The plaintiff next contends that the Act does not apply because he is not a 'creditor' as defined in Section 1602(f). The court in Gerasta, supra, at the trial level, interpreted this section as follows:

> "In enacting truth-in-lending legislation, it was Congress' intention to 'assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.' 15 U.S.C. Sec. 1601. The disclosure requirements, however, are imposed only on 'creditors,' or those who 'regularly extend, or arrange for the extension of credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise.' 15 U.S.C. Sec. 1602(f) (emphasis added).
>
> "[5) The Board has further defined the term 'creditor' to mean one 'who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers " 'to extend or arrange for the extension of such credit.' 12 F. R. Sec. 226.2 (m) (emphasis added). The exemption is limited, therefore, to those whose ' extensions [or arrangement] of credit are an occasional, isolated, and incidental portion of their business.' "

The question here, then is whether plaintiff was in the business of regularly extending credit. At trial, plaintiff denies that he made more than an "occasional" loan. He stated that he had no more than six to eight loans outstanding at any one time, including January, 1975.

Plaintiff's position at trial is contrary to all other evidence and to plaintiff's own admissions at the time of his deposition, when he responded as follows:

"Q. What is your occupation?

"A. Well, I used to be a farmer, I have a few cattle now, and I have a little lending business, just mostly coasting right now.

"Q. What is the nature of this lending business?

"A. What do you mean by the nature of it?

"Q. Well, what type of loans do you make?

"Q. Most any kind of loans, I don't loan on automobiles, no school teachers or cars, or nothing like that. Mostly real estate.

"Q. Primarily real estate and would these loans be secured by mortgages?

"A. Right.

"Q. How long have you been doing this?

"A. Since 1945.

"Q. Say, at any particular point in time, can you tell me approximately how many loans you might have outstanding?

"A. That I have out now? I would have to go through the book and add them up . . . fifteen or twenty, I imagine, something similar to that.

"Q. Is this number fairly constant ?

"A. Yes.

"Q. Moneywise, I suppose the total of the outstanding amount of the loans would vary, depending upon the size of the loan?

"A. Right, the size of the loan.

"Q. Would this also be true for the situation that existed in January of 1975?

"A. What do you mean, what would be true?

"Q. Well, the number of loans you had outstanding?

"A. Practically the same amount.

* * *

"Q. Just say, right now, outstanding, would you say that you had in excess of a half a million dollars in loans outstanding right now?

"A. I got more than that.

"Q. Would you think it would be a million?

"A. No, not that much.

"Q. Seven hundred fifty thousand?

"A. I'm not going to tell you how much I got out, to be frank with you. I don't believe that's quite any of your business. It's between a half million and a million.

"Q. Would it have been about this amount when you made the loan to Don Lester?

"A. Approximately."

Further evidence of the extent and regularity of plaintiff's lending activities is found in plaintiff's income tax returns for the years 1965-1976, which were introduced at trial. These returns include for each of those years, a form entitled "Schedule C-Profit (or Loss) from Business or Profession." Starting in 1968, plaintiff listed "Store and Loans" as his principal business activity. Entries show that plaintiff paid the following amounts of interest on business indebtedness:

"1969 - $96,000.00

1972 - 36,437.00

1973 - 63,575.00

1974 - 29,790.00

1975 - 34,158.46

1976 - 34,807.00"

At his deposition, plaintiff explained the 1976 entry as follows:

"Q. Other than that, the other large deduction item on this return is interest on business indebtedness. It says 34,809.85. Can you just briefly tell me the nature of

that business indebtedness, what the money was borrowed for?

"A. No, I can't. . . . that's money I borrowed?

"Q. Yes, sir, interest on money that you borrowed?

"A. Oh, well, that could have been several different places. I get by, and once in a while I get a chance to make a loan and I go and borrow the money . . . I used to know when I had some money coming in, but I don't know that no more. Since I have had them two years behind with their payments. I used to borrow a little money from banks, to make a loan. I'm not sure what that was for.

"Q. Would the loan be for the store?

"A. No, sir, the store has nothing to do with the loan business. The store stands out on its own, it operates on its own.

"Q. This interest that we are talking about . . .

"A. Interest is the interest that I make on my loaning business.

"Q. But this interest that you paid, this $34,809.00?

"A. That is some more of my loan business.

"Q. You borrowed money and turned around and loaned it to somebody else?

"A. That's right."

Based on the above and other evidence in the record, we have no difficulty in concluding that plaintiff is a "creditor" covered by the Act.

REMEDIES UNDER 15 U.S.C. 1601, ET SEQ.

Since we find the Act applies, the next issue is whether defendant is entitled to the remedies found in Sections 1635(a), (b) and (f), and 1640(a), which provide as follows:

> "Section 1635. Right of rescission as to certain transactions - Disclosure of obligor's right to rescind
>
> "(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section.

"Return of money or property following rescission

"(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. ***Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction.*** If the creditor has delivered any property to the obligor, the obligor "may retain possession of it. ***Upon the performance of the creditor's obligations under this section,*** the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

"Time limit for exercise of right

"(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this part have not been delivered to the obligor."

"Section 1640 Civil liability - Individual or class action

for damages; amount of award; factors determining amount of award

"(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of - -

"(1) any actual damage sustained by such person as a result of the failure;

"(2) (a) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000;

* * *

"(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

* * *

"Jurisdiction of courts

"(e) any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

In discussing the issue of remedies, the court in Geresta, supra, on appeal stated:

> "[2] This court has recognized that the Truth in Lending Act provides 'detailed remedial machinery' to redress violations of the Act. Sosa v. Fite, 498 F. 2d 114, 117 (5th Cir. 1974). Therefore, courts should apply those remedies provided in the Act. Burgess v. Charlottesville Savings and Loan Association, 477 F. 2d 40, 45 (4th Cir. 1973); Jordan v. Montgomery Ward & Co., 442 F. 2d 78, 81-82 (8th Cir.), cert. cenied, 404 U. S. 870 (92 S. Ct. 78, 30 L. Ed. 2d 114 (1971).
>
> * * *
>
> "[3.4] Section 1635 and Section 1640 are not mutually exclusive remedies; a consumer may be entitled to both rescission pursuant to Section 1635 and damages pursuant to Section 1640. See Mourning v. Family Publications Service, Inc. 411 U.S. 356, 376, 93 S. Ct. 1652, 36 L. Ed. 2d 318 (1973); Sellers v. Wollman, 510 F. 2d 119, 123 (5th Cir. 1975)."

SECTION 1635

This section becomes operative where, as here, the consumer credit transaction results in a security interest in a debtor's home. Section 1635(a). Since the Act applies, defendant here had a right to rescind the transaction for three days after the transaction or delivery of notices. Where, as here, no notices were ever delivered, the debtor's right to rescind continued until exercised or the three-year period expired. Within the three years, defendant notified plaintiff of his desire to rescind. Defendant testified that plaintiff did not respond to the notice.

Plaintiff, in his brief, concedes that under Section 1635(b),

defendant owes no interest and the mortgage is cancelled. Plaintiff raises a substantial question, however, as to the principal amount of the loan, i.e., $70,000. Does the debtor's right to rescind include the right to retain the loan proceeds.

In granting the rescission, the trial court ordered a forfeiture of the loan proceeds, stating that "The federal law also specifies that the plaintiff must forfeit the entire amount of the funds advanced to the defendants in connection with the loan." As we appreciate the federal jurisprudence, the trial judge erred in ordering an automatic forfeiture.

In Gerasta, supra, the court of appeal reversed the district court decision on the issue of the forfeit, only, and explained their position as follows:

> "The statement of law contained in this opinion may be usefully illustrated by its application to the facts involved in the case on appeal. The Gerastas determined that the defendant Bank had violated the disclosure provisions of the Act. Therefore, the Gerastas notified the Bank of their intention to rescind the loan transaction pursuant to Section 1635. The Bank did not perform its statutorily prescribed duties within ten days, allegedly because the Gerastas' rescission was equivocal and because the Bank was uncertain whether the transaction came within the ambit of the disclosure and rescission provisions of the Truth in Lending Act. The Bank's noncompliance exposed the Bank to the possibility of increased liability pursuant to Section 1640(a).
>
> "[6] It has now been judicially determined that the Gerastas were entitled to rescind their transaction with the Bank and that the Gerastas' notice of rescission was valid. Therefore, the Bank now must return to the Gerastas any money or property that it has received from them in connection with this transaction. The

> Bank also must take any action necessary to reflect the termination of any security interest created in the Gerastas' property by the transaction. ***Upon the Bank's performance of its duties, the Gerastas must tender the loan proceeds to the Bank. They should be given a reasonable time within which to do so. Unless the Bank fails to take possession within ten days of tender, its interest will not be forfeited.***
>
> "This court's decision in Sosa v. Fite, 498 F. 2d 114 (5th Cir. 1974), does not require a different result. In Sosa, as in the case on appeal, the creditors did not perform their statutorily prescribed duties after receiving the consumer's notice of rescission. In Sosa, however, the consumer's notice of rescission was accompanied by the consumer's express offer to return the creditor's property. The court in Sosa emphasized that the consumer's obligation to restore the creditor to the "status quo ante was discharged by the tender. In the case on appeal, on the other hand, the Gerastas stated in their rescission notice that they refused to tender the loan proceeds until the Bank performed its statutorily prescribed duties." (emphasis supplied)

There is no evidence nor contention in the present case that defendant ever tendered to plaintiff the loan proceeds. Therefore, the forfeiture provision in Section 1635(b) is not now applicable. Upon plaintiff's performance of his duties under the Act, the defendant must, within a reasonable time, tender to plaintiff the $70,000 loan.

SECTION 1640. PENALTIES AND ATTORNEY'S FEES

There is also a substantial question of law on the issue of damages and attorney's fees under Section 1640. At trial on June 2, 1977, plaintiff filed an exception of prescription based

on Section 1640(e), quoted above. The record does not contain a ruling on this exception, but there is reference to it having been overruled. Obviously, it was overruled because the trial court awarded the $1,000 maximum statutory damages under Section 1640(2) (2) (A) (1) and attorney's fees of $10.000 under Section 1604 (a) (3).

Defendant concedes in brief that the exception of prescription of one year should have been maintained as to Section 1640 damages. However, defendant argues that this prescription does not apply to the award of attorney's fees, citing Burley v. Bastrop Loan Company, Inc., 407 F. Supp. 773 (W. D. La. 1975). In that case, the district court held that a debtor who obtained rescission for a creditor's violation of the Act was entitled to an award of attorney's fees, even though his claim for damages had prescribed. This decision was reversed and remanded on the issue of liability, 590 F. 2d 160 (5th Cir. 1979) but continues to be cited by some Federal District Courts for its holding on the issue of attorney's fees. See Clemmer v. Liberty Financial Planning, Inc., 467 F. Supp. 272 (W. D. N.C. 1979).

Although decisions of Federal District Courts and Circuit Courts of Appeal construing federal statutes are persuasive. they are not binding on state courts. Only such decisions of the United States Supreme Court are binding on us. State v. Selman, 300 So. 2d 467 (La. 1974); Morris v. Transworld Drilling Company, 365 So. 2d 46 (3rd Cir. 1978); Bromley v. Crisp, 561 F. 2d 1351 (10th Cir. 1977).

We cannot agree with the decision in Burley v. Bastrop Loan Company, Inc., supra. In our view, Section 1640(e) is clear and free of ambiguity. It states that "any action under this section (i. e., Section 1640), may be brought . . . within one year from the date of the occurrence of the violation."

Section 1640 provides for damages, limited to $1,000, and a reasonable attorney's fee. Under 1640(e), any action for such relief must be brought within one year of the violation. We are supported in this view by Sosa v. Fite, 498 F. 2d 114 (5th Cir. 1974) and the cases cited there, which hold that penalty damages under Section 1640 are prescribed in one year. If penalties are prescribed in one year, it necessarily follows that attorney's fees are also, because both are provided by the same statute, Section 1640.

It is noteworthy that in at least two cases the Court of Appeal, Fourth Circuit, State of Louisiana, allowed a prescribed claim for damages under 15 U.S.C. 1640 to be used as a defense to a creditor's suit on the transaction. Termplan Mid-City, Inc. v. Laughlin, 333 So. 2d 738 (4th Cir. 1976) and Reliable Credit Service, Inc. v. Bernard, 339 So. 2d 952 (4th Cir. 1977). In these two cases the court applied LSA-C.C.P. Article 424, which permits a prescribed claim to be used as a defense to a suit on a related transaction. However, by Act No. 254 of 1977 our legislature amended Article 424 to expressly exclude prescribed claims under the Federal Consumer Credit Protection Act. Thus, Article 424 no longer has application in these suits.

WRONGFUL ISSUANCE OF SEQUESTRATION

The next issue is whether defendants are entitled to damages and attorney's fees for plaintiff's wrongful issuance of the writ of sequestration seizing their home.

The grounds for a writ of sequestration are provided in LSA-C.C. P. as follows:

> "Art. 3571. Grounds for sequestration
>
> "When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of

> sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action."

LSA-C.C.P. Article 3506 provides for dissolution of a wrongfully issued writ and for damages and attorney's fees.

Defendant complains here that the trial court erred in its omission of any reference to the issue of the wrongful sequestration. We agree. In light of the judgment canceling the mortgage, there was no real need to make a separate rule on the dissolution of the writ, but we find that a separate damage award is warranted because plaintiff had no grounds for the writ.

In a case dealing with a wrongful attachment, this court in American Steel Building Company v. Brezner, 159 So. 2d 623 (3rd Cir. 1963) stated:

> "As stated by our Supreme Court in General Motors Acceptance Corp. v. Sneed, 167 La. 432, 119 s. 417, 421 (1929): ' "Where a plaintiff sues out a writ of attachment in the honest belief that it is necessary for the protection of its rights, it seems rather unfortunate that it must be held liable for the payment of damages. But the writ of attachment is an extremely harsh remedy, and, when a party makes use of this powerful legal weapon he must be ready to respond in damages if it be found that the writ was wrongfully used." '

The issuance of the writ of sequestration in this case, coupled with the posting of the bond to attempt to obtain release of physical possession of the premises to the plaintiff, and the companion suit by plaintiff against the sheriff seeking to compel actual physical delivery of the defendants' home to the plaintiff during the pendency of this litigation, appears to have been a willful and deliberate attempt to cause harm,

damage, harassment, inconvenience, and mental anguish to the defendants. This action by the plaintiff was totally unwarranted for the reason that the property was subject to his mortgage of record, a suit for foreclosure was pending, and even had been tried one day at the time the writ of sequestration issued.

Mrs. Lester suffered emotional strain as a result of the issuance of the writ of sequestration and service upon her of the pleadings in the suit to compel the sheriff to deliver to R.C. Anderson actual physical possession of her home during the pendency of this drawn-out litigation. Mr. Lester also suffered.

Awards for inconvenience, anxiety and embarrassment caused as a result of the wrongful issuance of a writ are compensable damages. Homemakers Loan & Consumer Discount Company v. Arthur , 333 So. 2d 686 (La. App. 4th Cir. 1976); American Steel Building Company v. Brezner, 158 So. 2d 623 (La. App. 3rd Cir. 1964).

Defendants have prayed for $2,500 as damages and $1,500 as attorney's fees for the wrongful issuance of the writ of sequestration. They are entitled to these amounts.

USURY

Having granted defendants' demand for rescission of the transaction under the Act, we do not reach defendant's alternative demands based on usury.

DECREE

For the reasons assigned, the judgment appealed is affirmed in part and reversed in part and is recast to read as follows:

It is ordered, adjudged and decreed that, under the provisions of 15 U.S.C. Section 1635, that certain credit transaction

entered into between plaintiff and defendants on January 27, 1975 is rescinded. Plaintiff is ordered to return to defendants the sum of $8,983.28 in interest previously paid on the loan. Plaintiff is ordered to cancel and return to defendants the promissory note herein sued on. Plaintiff is ordered to cancel the collateral mortgage note in the sum of $77,000 of date January 27, 1975, made by defendants payable to themselves, and by them endorsed in blank, and plaintiff is ordered to take such steps as necessary to cancel and erase from the public records that certain collateral mortgage executed by defendants of date January 27, 1975, for the principal sum of $77,000, recorded in Mortgage Book 339, page 747 of the records of Natchitoches Parish, Louisiana, with which mortgage the note is paraphed for identification. Within a reasonable time, not to exceed thirty days, after plaintiff has performed the above obligations under this judgment, defendants are ordered to tender to plaintiff the sum of $70,000, representing the principal amount loaned in the credit transaction, without legal or conventional interest or any other charge. If defendants fail to tender to plaintiff the $70,000 within said thirty days, this judgment shall have the effect of a judicial mortgage under the provisions of LSA-C.C. Articles 3321, et seq. If defendants tender the $70,000 within said thrity days and plaintiff does not accept the $70,000 within ten days after tender, ownership of the money loaned vests in defendants without any obligation on their part to repay it.

It is further ordered, adjudged and decreed that the exception of prescription of one year filed by plaintiff as to defendants' reconventional demand for damages and attorney's fees under 15 U.S.C. Section 1640 be sustained, and defendants' demand for said damages and attorney's fees is dismissed.

It is further ordered, adjudged and decreed that there be judgment herein favor of Donald E. Lester, Jr. and Suzanne Surger Lester and against R. C. Anderson for the sum of $2,500 as damages, plus the sum of $1,500 as attorney's fees for the wrongful issuance of the writ of sequestration.

All costs in the trial court, as well as the costs of this appeal, are assessed against R. C. Anderson.

AFFIRMED IN PART, REVERSED IN PART, AND RECAST.

APPENDIX "B"

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

TENTH JUDICIAL DISTRICT COURT
PARISH OF NATCHITOCHES
STATE OF LOUISIANA

Filed Jun 19, 79

JUDGMENT

This matter came on for trial when there were present in Court: Russell E. Gahagan, attorney for plaintiff; and Henry B. Bruser III, attorney for defendants and plaintiffs in reconvention. The Court, considering the law and evidence and arguments of counsel, and considering the law and evidence to be in favor of defendants and plaintiffs in reconvention, Donald E. Lester, Jr. and Suzanne Furger Lester, declared:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, Donald E. Lester, Jr. and Suzanne Furger Lester, and against the plaintiff, R. C. Anderson, dismissing plaintiff's demands against defendants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson: rescinding and voiding the January 27, 1975 credit transaction between Donald E. Lester, Jr. and Suzanne Furger Lester and R. C. Anderson; cancelling the promissory note of Donald E. Lester, Jr. and Suzanne Furger Lester dated January 27, 1975, payable to the order of R. C. Anderson and sued upon by R. C. Anderson herein; ordering R. C. Anderson to return the above described promissory note to Donald E. Lester, Jr. and Suzanne Furger Lester and to further return the collateral

future holder motgage note pledged by them to secure payment of the hand note described above; and rescinding, voiding and ordering cancelled the act of collateral mortgage of Donald E. Lester, Jr. and Suzanne Furger Lester dated January 27, 1975, recorded in the mortgage records of Natchitoches Parish, Louisiana, at Mortgage Book 339, Page 747, paraphed for identification with the above described cancelled hand note.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson in the sum of EIGHTEEN THOUSAND NINE HUNDRED EIGHTY-THREE AND 28/100 ($18,983.28) DOLLARS for return of interest and attorney's fees with legal interest from judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and against R. C. Anderson in the sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS for civil penalties with legal interest from judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Suzanne Furger Lester and against R. C. Anderson in the sum of ONE THOUSAND AND NO/100 ($1,000.00) DOLLARS for civil penalties with legal interest from judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson casting R. C. Anderson for all costs of court.

JUDGMENT RENDERED at Natchitoches, Louisiana, on the 8th day of June, 1979, for written reasons assigned.

JUDGMENT SIGNED at Natchitoches, Louisiana. on this the 18 day of June. 1979.

/s/ W. Peyton Cunningham, Jr.,
W. PEYTON CUNNINGHAM, JR., JUDGE
TENTH JUDICIAL DISTRICT COURT

Attest A True Copy This 19 Day June 1979
IRBY L. KNOTTS. JR.
CLERK TENTH DIST. Ct. LA.
By /s/ Jacque Collinsworth Dpty. Clk.

APPENDIX "C"

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

NUMBER illegible
TENTH JUDICIAL DISTRICT COURT
NATCHITOCHES PARISH, LOUISIANA

OPINION

Plaintiff filed suit on a promissory note dated January 27, 1975 in the amount of $77,000.00. Defendants admitted execution of the note and a collateral mortgage note and a act of mortgage, and affirmatively defended the suit on the grounds of usury and that under the provisions of the Federal Consumer Credit Cost Disclosure Act, that plaintiff violated the Act by failing to make the appropriate credit disclosures and failing to inform defendants of their right of rescission under the Act.

The case was vigorously prosecuted and tenaciously defended. The Court makes the following findings:

Plaintiff is indeed in the lending business; he is subject to the Truth and Lending Act; he did discount the $77,000.00 note, giving defendants only $70,000.00 and keeping $7,000.00 on the date of the execution of the legal instruments; that the interest charged by plaintiff was usurious; that the plaintiff is a creditor and defendants are consumers within the Truth and Lending Act; that the money was used by the defendants for personal, family, household and agricultural purposes; that plaintiff failed to provide defendants with duplicates of the instruments, as required.

It is the reasoning of the Court that defendants are entitled

to rescission under the provisions of 15 U.S.C., et seq. and that the defendants are not liable for that finance or any other charges in connection with this obligation, and the Court finds the notes and mortgage void by operation of law.

The federal law also specifies that the plaintiff must forfeit the entire amount of the funds advanced to the defendants in connection with the loan.

Plaintiff's failure to provide defendants with notice of the right of rescission entitles each of the defendants to recover $1,000.00 statutory penalty for plaintiff's failure to make the required disclosures.

Defendants are entitled to return of all interest paid being the sum of $8,983.28 under the Truth and Lending Law.

Accordingly, let there be judgment in favor of Donald E. Lester, Jr. and Suzanne Furger Lester, declaring the note mortgage and collateral note dated January 27, 1975 for $77, 000.00 be rescinded and declared null and void and cancelling the mortgage on the house and property listed in the mortgage. Let there further be judgment in favor of Donald E. Lester, Jr. and Suzanne Furger Lester and against R. C. Anderson for the return of the interest previously paid on the loan in the amount of $8,983.28 plus judgment in favor of Donald E. Lester, Jr. and Suzanne Furger Lester for $1,000.00, each, for civil penalties, as provided in the Truth and Lending Law.

Let there further be judgment in favor of defendants for attorney fees, as allowed by the Truth and Lending Law for the sum of $10,000.00; all at the cost of R. C. Anderson.

Opinion rendered at Natchitoches, Louisiana, on this, the 8 day of June, 1979.

/s/ W. Peyton Cunningham, Jr.
W. PEYTON CUNNINGHAM, JR., JUDGE

COPY TO:

Mr. Russell E. Gahagan
P.O. Box 70
Natchitoches, Louisiana 71457

Mr. Henry B. Bruser, III
P.O. Box 1431
Alexandria, Louisiana 71301

APPENDIX "D"

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

NUMBER 42,947
TENTH JUDICIAL DISTRICT COURT
NATCHITOCHES PARISH, LOUISIANA

EXCEPTION OF PRESCRIPTION OF ONE YEAR

Now into court comes R. C. Anderson, defendant, in reconvention in the above entitled and numbered cause, appearing through his undersigned counsel, for the purpose of filing this exception of prescription to the reconventional demand filed herein, and with respect shows:

1.

That the cause of action sued on in the reconventional demand filed herein is barred by the statute of limitation of one year, U.S. Code Annotated, Title 15, Section 1640(e).

WHEREFORE, exceptor prays that this exception of prescription of one year be sustained and the reconventional demand filed herein be dismissed with costs.

GAHAGAN & GAHAGAN

By_____
Russell E. Gahagan
P.O. Box 70
Natchitoches, LA 71457
Attorney for Exceptor

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing exception of prescription of one year was handed to opposing counsel prior to the filing of the original.

_____

Russell E. Gahagan

APPENDIX "E"

CIVIL SUIT NO. 42,974

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

TENTH JUDICIAL DISTRICT COURT
PARISH OF NATCHITOCHES
STATE OF LOUISIANA

ANSWER AND RECONVENTIONAL DEMAND

NOW INTO COURT, through their undersigned counsel, come Donald E. Lester, Jr. and Suzanne Furger Lester, defendants and for answer to the petition of plaintiff, R. C. Anderson, with respect show:

1.

Defendants admit the allegations of paragraph 1

2.

Defendants deny the allegations of paragraph 2, except as may be hereinafter explained, admitted, or modified.

Further answering, defendants show that they did, on January 27, 1975, execute a note in favor of R. C. Anderson in the sum of $77,000.00, with ten (10%) per cent per annum interest from date until paid, and providing for attorney's fees of ten (10%) per cent of the amount due in the event that the note was placed in the hands of an attorney for collection.

3.

Defendants deny the allegations of paragraph 3, except as may be hereinafter explained, admitted, or modified.

Further answering paragraph 3, defendants show that they did execute a collateral mortgage and act of mortgage as set forth in paragraph 3.

4.

For lack of sufficient information upon which to justify belief, defendants deny the allegations of paragraph 4.

5.

Defendants deny the allegations of paragraph 5, except as hereinafter explained, admitted, or modified.

Further answering, defendants show that the said obligations are the best evidence of their content.

6.

Defendants deny the allegations of paragraph 6.

7.

Defendants deny the allegations of paragraph 7.

8.

Defendants deny the allegations of paragraph 8. FURTHER ANSWERING PLAINTIFF'S PETITION, DEFENDANTS SHOW:

9.

In addition to providing for interest at the rate of ten (10%) per cent per annum from date, the aforedescribed demand note included capitalized interest in the amount of $7,000.00, which capitalized interest when added to the ten (10%) per cent per annum interest from date constitutes usurious contrary to the laws of the State of Louisiana.

10.

Petitioner is not entitled to recover any interest whatsoever on the aforedescribed note.

11.

Defendants are entitled to recover the $8,983.28 usurious interest paid by them on the said note.

12.

Defendants allege on information and belief that petitioner, R. C. Anderson, is engaged in the business of lending money to various persons, firms or corporations, and is under the laws of the United States of American, and particularly Title I of the Federal Consumer Credit Cost Disclosure Act and Regulation Z in connection with same, required to make certain disclosures to all parties with whom he might deal in the lending of money and that the petitioner, R. C. Anderson, failed to make such disclosures to defendants herein all in contravention to the laws of the United States of America, specifically Title I of the Federal Consumer Credit Cost Disclosure Act and regulations promulgated thereunder.

13.

As a result of petitioner's failure to make the disclosures

required by Title I of the Federal Consumer Credit Cost Disclosure Act and regulations thereunder, petitioner is liable to defendants in actual damages in the amount of $50,000.00.

14.

In addition, petitioner is liable to defendants for twice the amount of the financing charge in connection with the transaction, limited to a maximum of $1,000.00.

15.

Petitioner is also liable to defendants for the costs and attorneys' fees in connection with any litigation, including this cause, wherein he seeks to enforce the collection of the primary, or underlying, obligation herein. As of the date of filing this Answer, defendants compute this amount to be approximately $15,000.00.

FURTHER PLEADING IN THE ALTERNATIVE, DEFENDANTS AVER:

16.

The obligation outlined in paragraphs 2 and 3 of the petition was a financing transaction on defendants' home to which the right of rescission under Title I of the Federal Consumer Credit Cost Disclosure Act and Regulation Z apply

17.

The said transaction was not a purchase money mortgage.

18.

Defendants are entitled to rescind and hereby make demand for the rescission of the credit transaction herein because of

the petitioner's failure to make the disclosures required under Title I of the Federal Consumer Credit Cost Disclosure Act and regulations thereunder.

WHEREFORE, Defendants pray for judgment rejecting petitioner's demand at his cost.

DEFENDANTS FURTHER PRAY that after due proceeding there be judgment herein in favor of defendants, Donald E. Lester, Jr. and Suzanne Furger Lester and against petitioner, R. C. Anderson, cancelling all interest on the note herein and awarding defendants $8,983.28 for recovery of usurious interest paid by them on the said note, together with legal interest from date of judicial demand until paid.

DEFENDANTS FURTHER PRAY that there be judgmenr herein in favor of defendants and against petitioner for damages allowed by Title I of the Federal Consumer Credit Cost Disclosure Act and Regulations thereunder in the amount of $66,000.00, plus other such additional damages which defendants may sustain thereunder between the filing of this answer and the date of its final adjudication, together with legal interest from the date of judicial demand until paid.

DEFENDANTS FURTHER PRAY, in the alternative, that there be judgment herein under Title I of the Federal Consumer Credit Cost Disclosure Act and regulations thereunder in favor of defendants and against petitioner, R. C. Anderson, rescinding the credit transaction between the parties hereto and declaring it to be void.

DEFENDANTS FURTHER PRAY that there be judgment herein in favor of defendants and against petitioner for all costs of these proceedings.

Respectfully submitted,

GOLD, LITTLE, SIMON, WEEMS & BRUSER

By: _____

Ralph B. Chustz
620 Murray Street
Alexandria, Louisiana 71301

ATTORNEYS FOR DEFENDANTS

CERTIFICATE

I certify that a copy of the foregoing pleading has been served upon the petitioner, defendant in reconvention, herein by placing same in the United States mail, postage prepaid, addressed to his attorney, Marvin F. Gahagan, Gahagan & Gahagan, Attorneys at Law, P.O. Box 70, Natchitoches, Louisiana, 71457, on the _____ day of February, 1977.

_____

Of Counsel

APPENDIX "F"

CIVIL SUIT NO. 42,974

R. C. ANDERSON
VERSUS
DONALD E. LESTER, JR., ET AL

TENTH JUDICIAL DISTRICT COURT
PARISH OF NATCHITOCHES
STATE OF LOUISIANA

FIRST AMENDED ANSWER AND RECONVENTIONAL DEMAND

Now into Court come Donald E. Lester, Jr. and Suzanne Furger Lester, defendants, who respectfully represent that they desire to amend and supplement their original answer and reconventional demand in the following respects:

1.

By amending Paragraph 14 thereof to read as follows:

"In addition, petitioner is liable to each defendant for twice the amount of the financing charge in connection with this transaction, limited to a maximum of $1,000.00 per defendant."

2.

By deleting the language "Further pleading in the alternative, defendants aver:" appearing immediately prior to Paragraph 16, so as to make the allegations of Paragraph 16, et seq., primary, rather than alternative, allegations.

3.

By amending Paragraph 18 to read as follows:

"Pursuant to the Federal Consumer Credit Cost Disclosure Act and Regulation Z thereunder, defendants have elected to rescind the credit transaction herein and have provided petitioner with notice of this election."

4.

By adding Paragraph 19, as follows:

"19.

As the result of the exercise of their right of rescission, defendants are not liable for any finance or other charge in connection with the said transaction and any security interest given by them, including any such interest arising by operation of law, has become void."

WHEREFORE, defendants pray for leave of Court to file this supplemental and amending answer and reconventional demand; that their answer and reconventional demand herein be supplemented and amended in the particulars set forth above, and that after due proceedings had, there by a judgment rejecting petitioner's demands.

DEFENDANTS FURTHER PRAY that after due proceedings, there be a judgment herein in favor of defendants, Donald E. Lester, Jr. and Suzanne Furger Lester, and against petitioner, R. C. Anderson, cancelling all interest on the note herein and awarding defendants $8,983.28 for recovery of usurious interest paid by them on the said note, together with legal interest from date of judicial demand until paid.

DEFENDANTS FURTHER PRAY that there be a judgment

herein in favor of defendants and against petitioner for damages under Title I of the Federal Consumer Credit Cost Disclosure Act and Regulations thereunder in the amount of $67,000.00 plus other such additional damages which defendants may sustain thereunder between the filing of their original answer and the date of final adjudication, together with legal interest thereon from the date of judicial demand until paid.

DEFENDANTS FURTHER PRAY that there be a judgment herein under Title I of the Federal Consumer Credit Cost Disclosure Act and Regulations thereunder in favor of defendants and against the petitioner, rescinding the credit transaction between the parties heretok declaring it to be void, and ordering petitioner to return all money previously paid by defendants in connection wherewith, and to take all appropriate and necessary steps to cancel and terminate any and all security interest created under the transaction.

DEFENDANTS FURTHER PRAY that there be a judgment herein in favor of defendants and against petitioner for all costs of these proceedings.

Respectfully submitted,

GOLD, LITTLE, SIMON, WEEMS & BRUSER

By _____

Ralph B. Chustz
620 Murray Street
Alexandria, Louisiana 71301

ATTORNEYS FOR DEFENDANTS

ORDER

LET the foregoing supplemental and amending answer and reconventional demand be filed as prayed for.

Natchitoches, Louisiana, this _____ day of May, 1977.

_____

Judge

PLEASE SERVE by personal service only:

Marvin F. Gahagan, Attorney of record
for R. C. Anderson
133 St. Denis
P.O. Box 70
Natchitoches, Louisiana 71457

or

Any partner or office associate
in the law firm of Gahagan & Gahagan,
133 St. Denis
P.O. Box 70
Natchitoches, Louisiana 71457

APPENDIX "G"

66,552

Special Releases - Correspondence

[¶31,230] DISPOSITION OF PROCEEDS AFTER RESCISSION

This letter responds to your request of February 28, 1975, for an opinion as to the practical effect of the right of rescission under §226.9 [¶3585 - 3591] of Regulation Z.

Staff agrees with your underlying assumption that the right of rescission provided for in § 226.9 exists in both qualifying sale and nonsale credit transactions inasmuch as that section by its terms is applicable to "any credit transaction" in which a security interest is or will be acquired in any realty used or expected to be used as the principal residence of the customer.

You state that, in a 36-month instalment loan situation, a cognovit provision in the loan contract gives rise to a §226.9 right of rescission under Ohio law. You have inquired as to the effect of the creditor's failure to provide the rescission notice required by §226.9(b) [¶3588] where the customer has made payments for several months and then decides to exercise his right of rescission. Under §226.9(d) [¶3588], within ten days of receipt of a proper notice of rescission, the creditor must return any property which he has received from the customer.

Your first question is whether the customer is required to return the proceeds of the loan to the creditor where the creditor has terminated any security interest created by the transaction and returned to the customer the payments made to the creditor. Under §226.9(d) the customer must "tender the property [received from the creditor] to the creditor" upon payment by the creditor to the customer of any money

or property which he has received from the customer in connection with the transaction. It is the view of the staff that the proceeds of the loan should be considered property received by the customer from the creditor and that, in this situation, the customer must make tender of the proceeds to the creditor.

In your second question you ask whether the failure of the creditor to return the payments to the customer within ten days entitles the customer to retain the proceeds of the loan without further obligation to the creditor. Where the creditor has delivered property to the customer, § 226.9(d) provides that he may retain possession of it; only upon the creditor fulfilling his obligations under the subsection is the customer required to make tender of the property to the creditor. If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation.

Your third question is whether, in the situation described in question two, the customer can both maintain a cause of action against the creditor for not returning the payments to him ans retain the proceeds of the loan without further obligation to the creditor. While it is true that the customer may retain the proceeds in question two, §226.9(d) also provides, as explained in the response to question one, that the customer must make tender of the proceeds to the creditor where the creditor returns the payments. The customer may bring a civil action against the creditor for violation of Regulation Z, but it is the view of the staff that he must make tender of the loan proceeds to the creditor should the creditor return the payments within the stated period. Under the civil liability provisions, there might be a question as to whether a customer retaining the proceeds could be awarded the unreturned payments as damages.

For further guidance on this issue, we would direct your attention to *Eby v. Reb Realty*, CCH ¶98,839, April 1, 1974, in which the Ninth Circuit Court of Appeals addressed the issue of rescission and civil liability under Truth in Lending.

Excerpts from FRB Letter of May 29, 1975, by Jerauld C. Kluckman, Chief, Fair Credit Practices Section.

¶31,230
1975, Commerco Clearing House, Inc.

APPENDIX "H"

APPLICABLE STATUTES AND REGULATIONS

I. Applicable Statutes:

15 U.S.C. 1635:

"(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the thrid business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section, the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to the obligor to exercise his right to rescind any transaction subject to this section."

"(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or

property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under this transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it."

"(f) An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required under this section or any other material disclosures required under this part have not been delivered to the obligor."

15 U.S.C. 1640:

"(a)Except as otherwise provided in this section any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of–

(1) any actual damage sustained by such person as a result of failure;

(2) (a) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."

"(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

28 U.S.C. 2101:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

II. Regulations:

12 C.F.R. 226.9. Right to rescind certain transactions:

"(a) *General Rule.* Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the thrid business day, following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business.

(b) *Notice of opportunity to rescind.* Whenever a customer has the right to rescind a transaction under paragraph (a) of this section, the creditor shall give notice of that fact to the customer by furnishing the

customer with two copies of the notice set out below, one of which may be used by the customer to cancel the transaction. Such notice shall be printed in capital and lower case letters of not less than 12 point boldfaced type on one side of a separate statement which identifies the transaction to which it relates. Such statement shall also set forth the entire paragraph (d) of this section, "Effect of rescission." If such paragraph appears on the reverse side of the statement, the face of the statement shall state: "See reverse side for important information about your right of rescission." Before furnishing copies of the notice to the customer, the creditor shall complete both copies with the name of business, the date of consummation of transaction, and the date, not earlier than the third business day following the date of the transaction, by which the customer may give notice of cancellation. Where the real property on which the security interest may arise does not include a dwelling, the creditor may substitute the words "the property you are purchasing" for "your home," or "lot" for "home," where these words appear in the notice.

Notice to customer required by Federal law:

You have entered into a transaction on .... which may
(Date)
result in a lien, mortgage, or other security interest on your home. You have a legal right under Federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within 3 business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any

downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying . . . . . at
(Name of Creditor)
(Address of creditor's place of business) by mail or telegram sent not later than midnight of . . . . . .
(date)
you may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

. . . .
(date) (customer's signature)

(c) *Delay of performance.* Except as provided in paragraph (e) of this section, the creditor in any transaction subject to this section, other than an extension of credit primarily for agricultural purposes, shall not perform, or cause or permit the performance of, any of the following actions until after the rescission period has expired and he has reasonably satisfied himself that the customer has not exercised his right of rescission:

(1) Disburse any money other than in escrow.

(2) Make any physical changes in the property of the customer;

(3) Perform any work or service for the customer; or

(4) Make any deliveries to the residence of the customer if the creditor has retained

or will acquire a security interest other than one arising by operation of law.

(d) *Effect of rescission.* When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after the tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it."

NO. 80-495

FILED
DEC 29 1980
MICHAEL RODAK JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR., and
SUE FURGER LESTER

Petitioners

VERSUS

LAURA ANDERSON, EXECUTRIX OF THE ESTATE OF R. C. ANDERSON

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

MARVIN F. GAHAGAN
GAHAGAN & GAHAGAN
123 St. Denis Street
P. O. Box 70
Natchitoches, Louisiana 71457
(318) 352-2069

Attorneys for Respondent

QUESTION PRESENTED

1. Is the Creditor entitled to collect the principal of the debt inspite of the fact that he did not surrender the security instrument when notified that the debtor wished to cancel the transaction, under 15 U. S. C. A. Sec. 1635.

INTERESTED PARTIES

1. Donald E. Lester, Jr., and Sue Furger Lester, Route 1, Natchitoches, Louisiana.

2. Laura Anderson, Executrix of the Estate of R. C. Anderson, Route 2, Robeline, Louisiana.

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ARGUMENT

The State Courts have determined that ANDERSON is a creditor and the LESTERS are customers within the contemplation of the Truth-in-Lending Act, 15 U. S. C. A. Sec. 1635.

Creditor admits having received from LESTERS' attorney a letter dated May 5, 1977 stating:

> "Pursuant to the provisions of the Truth-in-Lending Act and Regulation Z thereunder, Donald E. Lester, Jr. and Suzanne Furger Lester hereby elect to rescind the captioned credit transaction entered into with you on January 27, 1975".

ANDERSON further admits that despite the above quoted letter he neither returned the money to the LESTERS nor did he cancel the security instrument as of the date the case was tried in the District Court. Since the opinion of the Louisiana Third Circuit Court of Appeal the mortgage has been cancelled and a return of all money received has been tendered to petitioners.

We point out that in the letter dated May 5, 1977 quoted above nothing was said about returning the ANDERSON'S $70,000.00. The record will show that the LESTERS were heavily in debt, with numerous mortgages and judgments of record against them and it is fair to assume that they well knew that if ANDERSON would cancel his security instrument (mortgage) there would be no way in the world he could, as conditions then existed, enforce collection and they would keep the money and pay no part of it.

The record in this case shows that Mr. Lester was a much more sophisticated business man, though less financially successful, than ANDERSON who had no office, no business telephone, no bookkeeper and no secretary. He did make an

occasional loan. To permit LESTER to keep the money he borrowed and repay no part of it would unjustly enrich him and penalize ANDERSON. Equity is all with ANDERSON. See *Gerasta v. Hibernia National Bank*, 575 F. 2d 580 (5th Cir. 1978); *Harris v. Tower Loan of Mississippi, Inc.*, 609 F. 2d 120 (5th Cir. 1980); and *Bustamonte v. First Federal Savings & Loan Association*, 619 F. 2d 360 (5th Cir. 1980).

It is true that when Congress enacted 15 U. S. C. A. Sec. 1635(b) it laid down seven steps pertaining to the parties involved:

1. Immediately upon recission the customer is relieved of liability for any finance charge or other charge under the contract.

2. Immediately upon recission the security interest becomes void.

3. The creditor, within ten days must return any money or property which the customer may have given.

4. The creditor, within ten days, must take all action necessary to reflect termination of the security interest.

5. The customer may retain any property in his or her possession *until the creditor performs the duties imposed by this section.* (Emphasis added).

6. Upon the creditor's performance of those duties the customer must tender that property back to the Creditor.

7. If the creditor does not take possession of the property within ten days of tender by the customer, ownership vests in the customer.

Nowhere in the statute does it say that ownership shall vest

in the customer if the creditor fails within ten days to return the property and terminate the security. The statute simply states that until the creditor has done those two things, the customer may retain the property in his or her possession.

Petitioners concede that the exception of prescription of one year should have been maintained as to Section 1640 damages, but argue that prescription does not apply to attorney's fees. Section 1640 provides for damages, limited to $1,000.00 and a reasonable attorney's fee. Under 1640(e), any action for such relief must be brought within one year of the violation. If penalties are prescribed in one year, it necessarily follows that attorney's fees are also, because both are provided by the same statute, Section 1640.

We respectfully submit that the writ petitioned for should be denied.

By Attorneys

GAHAGAN & GAHAGAN

BY: Marvin F. Gahagan pm 7m 4.5.

MARVIN F. GAHAGAN
123 St. Denis Street
P. O. Box 70
Natchitoches, Louisiana 71457
(318) 352-2069

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that three copies of the Opposition to Writ of Certiorari have been served upon:

1. Henry B. Bruser, III
   Attorney for Petitioners
   P. O. Box 6118
   Alexandria, Louisiana 71301

2. Catherine L. Stagg, As Amicus Curiae
   Staff Attorney
   Louisiana Department of Justice
   Consumer Protection Section
   1885 Wooddale, Suite 1208
   Baton Rouge, Louisiana 70806

3. James G. Boyle and Paul Kens
   Attorneys for Amicus Curiae
   Consumer Federation of America
   1012 14th Street, N. W.
   Washington, D. C. 2005

by depositing the same in the United States Mail with first class postage prepaid and properly addressed as above shown.

NATCHITOCHES, Louisiana, this 24th day of December, 1980.

Marvin F Gahagan pc m.a.

MARVIN F. GAHAGAN

MOTION FILED
OCT 22 1980

NO. 80-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR. AND
SUE FURGER LESTER,
Petitioners

v.

LAURA ANDERSON, EXECUTRIX OF THE
ESTATE OF R. C. ANDERSON,
Respondent

ON WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

Motion of Consumer Federation of America For Leave To File Brief As Amicus Curiae And Brief of Consumer Federation of America As Amicus Curiae

JAMES G. BOYLE,
Counsel of Record
Consumer Federation of America
1012 14th Street N.W.
Washington, D.C. 20005

PAUL KENS,
Attorney at Law

Attorneys for Amicus Curiae
Consumer Federation of America

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

NO. 80-495

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OCTOBER TERM, 1980

DONALD E. LESTER, JR. AND
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Respondent

**ON WRIT OF CERTIORARI TO THE
LOUISIANA COURT OF APPEAL,
THIRD CIRCUIT**

Motion of Consumer Federation of America To File Brief As Amicus Curiae

---

The Consumer Federation of America respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorney for the Petitioner herein has been obtained, but consent for the filing of this brief has not been obtained from the attorney for the Respondent.

The Applicant, Consumer Federation of America has an interest in this case to the degree that it is an organization existing for the purpose of representing consumer interests.

The petition for writ of certiorari filed by the Petitioner herein argues that ownership of property transferred to Petitioner as a result of the credit transaction which is the subject of this action should vest to the Petitioner due to Respondents failure to comply with subsection 1635(b) of the Federal-Truth-in Lending Act. It does not, however, discuss Congressional intent with regard to that subsection or the result of the courts' failure to so rule. Applicant has no reason to believe that this point will be expanded and made complete in this Court. If this argument is approved by this Court, the decision of the court below must be reversed.

Respectfully submitted,

JAMES G. BOYLE
Counsel of Record

PAUL KENS

Attorneys for Amicus Curiae
Consumer Federation of America

By: _____

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LOUISIANA COURT OF APPEAL,
THIRD CIRCUIT**

Brief of Consumer Federation Of America As Amicus Curiae

INTEREST OF AMICUS CURIAE

Consumer Federation of America is a federation of over two hundred national, state and local non-profit

organizations that have joined together to expouse the consumer viewpoint. Among its membership are Consumer Union publisher of *Consumer Report,* 17 co-operatives and credit union leagues, 45 state and local consumer organizations, 66 rural electric co-ops and 16 national labor organizations. The interest of Consumer Federation of America is limited to a concern that the Federal-Truth-in-Lending Act and Federal Reserve Board Regulation Z remain valuable and useful to consumers.

SUMMARY OF THE ARGUMENT

Section 1635(b) of the Truth In Lending Act and § 226.9(d) of Regulation Z both set forth a detailed schema which governs the actions of both parties when a customer chooses to rescind a credit agreement in accordance with the Act. The Federal Reserve Board and at least one Circuit Court have opined that a creditor's failure to comply with the subsection results in ownership of all property transferred to the customer vesting in the customer. Other courts have refused to strictly construe the subsection and have refused to apply this vesting rule. The result has been confusion with respect to application of the subsection and the consequences of a creditor's failure to comply.

The wholesale modification of the explicit statutory rescission procedure would be contrary to congressional intent and the purpose of the subsection. The application of the "vesting rule" is critical in order to create the incentive for voluntary compliance by creditors.

ARGUMENT

I.

The purpose of the detailed statutory procedure for Rescission under Truth-In-Lending is to shift the burdens which are applicable to Common Law Rescission and to insure that the Customer will not have to take legal action to seek Restitution from the Creditor.

An analysis of the rescission provision of the Truth-In-Lending Act, 15 U.S.C.A. § 1635, should begin by recognizing that Congress was not silent about the effect of an act of rescission. Such silence would be presumed to have meant that rescission under the T.I.L.A. was to carry the same requirements and have the same effect as in common law or as rescission under the Uniform Commercial Code.

Quite to the contrary, Congress provided a detailed statutory schema governing the effect of a proper rescission by a customer and what actions each party must take. 15 U.S.C.A. § 1635(b); *see also,* 12 C.F.R. § 226.9(d). That schema may be summarized as follows:

1. Immediately upon rescission the customer is relieved of liability for any finance charge or other charge under the contract.
2. Immediately upon rescission the security interest becomes void.
3. The creditor, within 10 days, must return any money or property which the customer may have given.
4. The creditor, within 10 days, must take all action necessary to reflect termination of the security interest.

5. The customer may retain any property in his or her possession until the creditor performs the duties imposed by this section.

6. Upon the creditor's performance of those duties, the customer must tender that property back to the creditor.

7. If the creditor does not take possession of the property within 10 days of tender by the customer, ownership vests in the customer.

The purpose of this detailed statutory machinery is not specifically set forth in the Act. It is evident, however, that Congress was dissatisfied with the traditional rules surrounding the remedy of rescission. In response, what it has plainly attempted to do is to create a subtle shift in burdens. Not only a shift in legal burdens of proof, but also a shift in the practical burden of going forward in the case of a dispute.

At common law, restitution is an essential element of rescission, and rescission is effective only if the rescinding party makes a tender or unconditional offer to return the consideration received. *See,* Note, *Truth-In-Lending: Judicial Modification of the Right of Rescission,* 1974 Duke L.J. 1227, 1229-30. The ultimate goal of the common law rules governing rescission is to restore the status quo and to avoid allowing the rescinding party to be unjustly enriched as a result of its act of rescission. To effect common law rescission, the buyer bears the risk that the seller will not return the consideration which has been paid prior to rescission. If that should occur, the rescinding party bears the burden of going forward with judicial action seeking restitution.

Rescission under the Federal Truth-In-Lending Act exists for a different reason than rescission in common law or provided by the Uniform Commercial Code. The latter provide rescission as a buyer's remedy where circumstances render a contract void or voidable or nonconformance with contract terms substantially impairs its value to the buyer. *See generally,* U.C.C. §§ 2-601, 2-602. Truth-In-Lending rescission is not really a remedy at all. It is a creature of statute arising from congressional concern that a person's or family's homestead be lightly or unknowingly used as security for a loan. The right to rescind applies to any consumer credit transaction in which a security interest is or will be taken on real property which is used or expected to be used as the principal residence of the customer. 15 U.S.C. § 1635(a); 12 C.F.R. 226.9(a). The right exists for three business days following the date of the consumation of the transaction, receipt of a notice of the right to rescind, or receipt of all of the material disclosures required by the T.I.L.A. 15 U.S.C. § 1635(a); 12 C.F.R. § 226.9(a).

The ultimate goal of the Truth-In-Lending rescission provision is also a return to the status quo. Congress, however, recognized that both parties have obligations upon rescission and it is impossible to act on them simultaneously. There are steps in the return to status quo, and, through the schema of Section 1635(b), Congress intentionally places the consumer in a strong position during the journey. It might be logical, as the Supreme Court of Arkansas opined, to require the customer to act first and bear the risk of the creditor responding in bad faith. *Turner v. West Memphis Federal Savings & Loan Assn.,* 588 S.W.2d 691, 696 (Ark. 1979). It is not logic, however, but the statute itself which should rule.

II.

The statutory procedure for Rescission set forth in Section 1635(b) should be liberally construed to affect its purpose. Thus, a Creditor's failure to fulfill the requirements of the subsection should relieve the Customer of the Duty to Tender Property which has already been transferred and result in Ownership of that Property Vesting in the Customer.

The important issue now before the Court arises out of the fact that the Act does not specifically state what will be the effect of a creditor's failure to perform the requisite statutory duties within 10 days from receipt of a customer's notice of rescission.[1] This response, to a notice of rescission would effectively take away from the consumer the upper hand which Congress intended. The lien would be void but still on file. The customer would be entitled to certain property but wouldn't have it.

With this in mind the Fifth Circuit had initially taken the unequivocal position that a creditor's failure to perform would result in ownership of all property in the customer's possession vesting in the customer. *Sosa v. Fite*, 498 F.2d 114 (5th Cir. 1974). In doing so, the Court relied upon legislative intent and cited legislative history.

> That this result was intended is clear beyond preadventure, for one of the measure's principal sponsors in the house states: "[I]f the seller does not come back to pick up [his property] after the 10-day period [following the notice of rescission], the buyer can keep this item and he does not even have to

1. This 10 day requirement was changed to 20 days by the Truth-In-Lending Simplification and Reform Act P.L. 96-221. *See*, CCH Installment Credit Guide, Report 304, p. 1553 (April 30, 1980).

> pay for it . . ." *Sosa, supra* at 119, 120 (citing 114 Cong. Rec. 14398 (1968)).

The Federal Reserve Board took an identical position in a Public Information Letter dated May 29, 1975.

> Where the creditor has delivered property to the customer, Section 226.9(d) provides that he may retain possession of it; upon the creditor fulfilling his obligations under the subsection is the customer required to make tender of the property to the creditor. *If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirement of the subsection, and staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without obligation.* CCH, Consumer Credit Guide, 31,230 (1974-1977 Transfer Binder) (emphasis added).

The Supreme Court has held that opinions of the Federal Reserve Board should be given great weight in construction of the Truth-In-Lending Act. *Ford Motor Credit Company v. Milhollin*, ____U.S.____, 100 S.Ct. 790, ____L.Ed.2d____ (1980).

This vesting remedy provides a strong incentive for the creditor to follow the statutory schema. That the remedy is harsh cannot be denied. Its fairness, however, should be viewed in light of the fact that the creditor can easily avoid the harsh result by simply complying with the mandate of the Act. This was recognized in *Sosa*, the Court noting that ". . . [The creditor's] lament of any inequity being visited upon them is utterly unpersuasive for the power was completely theirs to prevent this parade of creditor horribles from ever occurring." *Sosa, supra* at 120.

By complying with the provisions of the Act, the creditor does not give up the right of restitution. It does release its lien. That lien, however, is void upon notice of rescission in any case. 15 U.S.C. § 1635(b). The fairness of this requirement should also be viewed in light of the fact that there are other mistakes a creditor can make which will result in the loss of an effective lien. In Texas, for example, failure to have a written contract signed by both the husband and wife will result in a lien on homestead being void. Tex. Fam. Code, Section 5.81. Failure to comply with the Texas Home Solicitation Sales Act will result in a lien on personal property being void. Tex. Rev. Civ. Stat. Ann., Art. 5069-13.01 et. seq. Also, failure to properly file many types of liens will result in their being ineffective with regard to third parties. The creditor is also required to restore the customer to his or her former position by returning all payments previously made.

Some authorities consider it inequitable to require the lender to release the lien and return payments without any expectation of receiving anything of value in return. *Turner v. West Memphis Savings & Loan Assn., supra* at 696. One must question how this is more inequitable, however, than requiring the customer to return all of the money or property received with no expectation that the lien will be released or the money paid to the creditor returned. Even the Uniform Commercial Code, which is not designed with consumer interest in mind, does not place so heavy a burden on a buyer who rejects goods or revokes a contract. Under the U.C.C. the revoking party has the duty only to hold the goods for the seller and not take action inconsistent with the seller's ownership. *See*, U.C.C. §§ 2-602, 2-608. Furthermore, the U.C.C. pro-

vides the buyer with protection, in form of a security interest on goods in its possession and control, against the seller's failure to make restitution. U.C.C. § 2-711(3).

Congress has not deviated from common principles of equity in formulating Section 1635(b) of the Truth-In-Lending Act. Its intent in providing the course that each party is to take upon notice of rescission should not be ignored.

The vesting rule expressed by the Federal Reserve Board and in *Sosa* is the heart of this rescission procedure. The Supreme Court of Colorado, interpreting an identical provision in the Uniform Consumer Credit Code states,

> . . . [It] is intended as an impetus for the creditor to take immediate action to clear title and to fulfill its obligations. If not interpreted in this way, there is no stimulus for the creditor to comply with the statutory provisions requiring him to release the security interests within the ten day period. *Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720, 725 (Colo. 1976).

The stimulus must be strong in order to encourage voluntary compliance. Voluntary compliance is a central concept of the Truth-In-Lending Act.

III.

Judicial modification of the Rescission Procedure set forth in Section 1635(b) and refusal in some instances to apply the "Vesting Rule" reduces the likelihood of Voluntary Compliance with that Subsection.

The "vesting rule" has not been enthusiastically accepted by all courts. In fact, in a recent decision, the Fifth

Circuit has substantially modified it. *Gerasta v. Hibernia National Bank,* 575 F.2d 580 (5th Cir. 1978).

The result in *Gerasta,* that the creditor's failure to take the requisite action within 10 days did not result in ownership of property vesting in the customer, was opposite that of *Sosa.* The Court, however, specifically distinguished rather than overruled *Sosa. Gerasta, supra* at 584 (footnote 3).

The first distinction made by the Court in *Gerasta* focused on an amendment of the remedies provision of Truth-In-Lending. 15 U.S.C. § 1640. The statute originally provided statutory damages only for a creditor's failure to disclose any information "required under this part." As amended in 1974, the remedies section applies to all failures to comply with the requirements of the Act, including those requirements of the rescission provision in § 1635. *Sosa* was based on the Act prior to the 1974 amendments. It was thus implied in the *Gerasta* opinion that there was no remedy, other than vesting, for the creditor's failure to properly react to Mrs. Sosa's rescission notice. But the *Gerasta* opinion saw a remedy under the amended version of Truth-In-Lending. *Gerasta, supra* at 593.

Many cases, however, involve a claim for statutory damages for the creditor's failure to make proper disclosures in addition to the action for rescission. Indications are that only a single recovery of statutory damages under the Act may be awarded to each customer even though there are multiple violations. *See, Turner v. Firestone Tire and Rubber Co.,* 537 F.2d 1296 (5th Cir. 1976). Thus, where both disclosure violations and rescission are claimed there is no effective remedy for a credi-

tor's failure to follow the statutory procedure. Except for the vesting rule applied in *Sosa,* a creditor would be able to ignore the customer's rescission without risk of increased liability.

In some cases disclosure violation may not be claimed or such a claim may be barred by the one year statute of limitations, 15 U.S.C. § 1640(e). Even then, the maximum recovery of $1000.00 under 15 U.S.C. § 1640(a) provides little incentive for voluntary compliance. This is obvious when the amount which the creditor may stand to gain by ignoring the rescission is considered, rescission being most commonly applicable in cases involving relatively large loans or home improvement contracts. It is also obvious when the amount which the creditors may stand to save in legal expenses by ignoring the rescission and thus reversing the burden of going forward is considered. The creditor will win disputes by default whenever a customer cannot bear the expense of legal action.

A second distinction between *Gerasta* and *Sosa* is reflected in the facts of each case. The notice of rescission by Mrs. Sosa included an express offer to return the property then in her possession. *Sosa, supra* at 118. The Gerastas, on the other hand stated in their rescission notice that they refused to tender the loan proceeds until the Bank performed its statutorily prescribed duties. *Gerasta, supra* at 584.

The facts in many instances will fall between *Gerasta* and *Sosa,* the notice of rescission being silent with regard to the disposition of the property in the customer's possession. This appears to be the case in the Petition now before the Court.

Customers in consumer credit transactions are likely to be unsophisticated in the use of credit. Furthermore, they may be using a form provided by the creditor, in giving notice of rescission. It is hard to imagine that, by its opinion in *Gerasta,* the Fifth Circuit intended to place a duty on customers to inform creditors of their legal rights in the event of rescission. What is more likely is that the Court focused on the language of the rescission notice as an indication of the equities of the case and the state of mind of the parties.

Rescission under the Federal Truth-In-Lending Act is a statutory right, not an equitable remedy. *See, Palmer v. Wilson,* 502 F.2d 860, 861 (4th Cir. 1974). Nonetheless, courts cannot be expected to apply the statute blindly when to do so would yield a patently inequitable result. Several Circuit Court decisions have refused to apply the vesting rule and allow a complete windfall to the customer (as in *Sosa*) where the circumstances indicated that it would be inequitable to do so.

A Fourth Circuit decision is illustrative in that it focused on the attitude of both parties to determine the equities. *Powers v. Sims & Levin,* 542 F.2d 1216 (4th Cir. 1976). There the majority found that the creditor had acted in good faith in that there was a real dispute as to whether the facts which the customer alleged to be the basis of the right to rescind were true. *Powers, supra* at 1218. The customer, on the other hand, unequivocally refused to tender a portion of the money the creditor had paid out under the transaction. *Powers, supra* at 1220, 1221. The majority thus found that there had been an anticipatory breach on the part of the customer rather than a rescission under Truth-In-Lending Act. *Powers, supra* at 1220.

Several decisions refusing to apply the "vesting rule" have modified the statutorily prescribed rescission procedure. Yet no clearly articulated standard for when such modification is appropriate has arisen. The *Gerasta* and *Powers* opinions reveal two circumstances which are relevant. The first is the existence of bad faith of the customer, the second is evidence that there is a real question of the propriety of the rescission. A third circumstance may be the creditor's good faith effort to comply with the statutory procedure. For example, the Fifth Circuit has found it to be proper for a creditor to offset the value owed to it by the customer from the sum it initially returns to the customer. *Harris v. Tower Loan of Mississippi, Inc.*, 609 F.2d 120 (5th Cir. 1980).

Other decisions have reached the same conclusion without providing a clear rationale. The Tenth Circuit in *Rachbach v. Cogswell*, 547 F.2d 502 (10th Cir. 1976) held that because of an incomplete record of the trial, it could not say that the trial court had abused its discretion in imposing an equitable condition on the right of rescission. In *Palmer v. Wilson*, 502 F.2d 860 (9th Cir. 1974). The Ninth Circuit held that the requirement of tender may be equitably imposed where the customer seeks both rescission and statutory damages plus attorney fees. The facts in that case were not set forth in enough detail to determine what equitable consideration may have been present. *See also, Ljepava v. M.L.S.C. Properties, Inc.*, 511 F.2d 935 (9th Cir. 1975); *La Grone v. Johnson*, 534 F.2d 1360 (9th Cir. 1976).

A Fifth Circuit opinion reported after *Gerasta* refuses to apply the vesting rule even though there appear to be no special circumstances for doing so. This case, with little discussion, seems to blindly follow the outcome of

Gerasta. It ignores the *Gerasta* opinion's explicit statement that it did not overrule *Sosa. Bustamante v. First Federal Savings and Loan Association,* 619 F.2d 360 (5th Cir. 1980).

CONCLUSION

The ad hoc judicial modification of the right of rescission under the Truth-In-Lending has resulted in a confusing drift away from the intent of Congress in passing Section 1635(b). If this subsection is to have the intended effect, there must be an unambiguous and strong incentive for creditors to carry out the duties prescribed. Like all other parts of the Truth-In-Lending Act, this section should be liberally construed to affect its purpose. *Mourning v. Family Publications' Services, Inc.,* 411 U.S. 356, 93 S.Ct. 1652, 36 L.Ed. 318 (1973).

In the absence of circumstances which would make it grossly inequitable to do so, a creditor's failure to respond to a notice of rescission as directed by the Act should result in its forfeiture of property in the customer's possession.

Respectfully submitted,

JAMES G. BOYLE,
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Consumer Federation of America

CERTIFICATE OF SERVICE

I certify in accordance with Rule 28(3) that three copies of this Motion for Leave to File Brief as Amicus Curiae and Amicus Curiae Brief have been served upon each of the parties represented by depositing same in the United States Mail with postage prepaid and properly addressed to their Attorneys of Record, Russell E. Gahagan, Gahagan and Gahagan, Attorneys for Respondent, Post Office Box 70, Natchitoches, Louisiana 71457, and Henry B. Bruser III, Gold, Little, Simon, Weems & Bruser, Attorneys for Petitioners, Post Offce Box 6118, Alexandria, Louisiana, 71301.

October _____, 1980

PAUL KENS

CERTIFICATE OF FILING

I certify that to my knowledge Forty copies of this Motion for Leave to File Brief as Amicus Curiae and Amicus Curiae Brief were filed this day in accordance with Rule 28(2) by depositing them at a United States Post Office, first class postage prepaid, correctly addressed to Michael Rodak, Jr., Clerk, Supreme Court of the United States, Washington, D.C., 20543.

October _____, 1980

ROBERT C. SOHNS, JR.

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NO. 80-495

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DONALD E. LESTER, JR., AND SUE FURGER LESTER,
Petitioners

VERUS

LAURA ANDERSON, EXECUTRIX OF THE ESTATE OF
R. C. ANDERSON,
Respondent

ON WRIT OF CERTIORARI TO THE LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR STATE OF LOUISIANA

QUESTIONS PRESENTED FOR REVIEW

I. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635 (b) to effect rescission of a consumer loan under the Truth in Lending Act required to return to the consumer all money received from the consumer and to forfeit to the consumer the balance of the loan proceeds?

II. Is a creditor who illegally refuses to perform the acts required by 15 U.S.C. 1635 (b) to effect rescission of a consumer loan under the Truth in Lending Act required to pay civil penalties and attorney's fees to a consumer who sues for this violation of the Act?

LIST OF PARTIES

Petitioners: Donald E. Lester, Jr. and Sue Furger Lester, husband and wife.

Respondent: Laura Anderson, Testamentary Executrix of the Estate of R.C. Anderson.

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INTEREST OF THE AMICUS CURIAE

The Unfair Trade Practices and Consumer Protection Law, also known as Louisiana's "Mini-F.T.C. Act," La. R.S. 51:1400-1418, was enacted by the Louisiana Legislature in 1972 for the purpose of affirmatively declaring unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." La. R.S. 51:1405 A. The enforcement of the Act is entrusted to the Attorney General of the State of Louisiana. The Attorney General is empowered by the Act to institute legal proceedings and to take other such actions which are provided by the Act itself or which are necessary or incidental to the exercise of his powers and functions. La. R.S. 51:1404 C.

Section 1406 (4) specifically exempts from the scope of the Act "any conduct which complies with section 5 (a) (1) of the Federal Trade Commission Act [15 U.S.C., 45(a) (1)], as from time to time amended,

any rule or regulation promulgated thereunder and any finally adjudicated court decisions interpreting the provisions of said Act, rules and regulations." This provision of the Act has been cited by Louisiana courts as authority to incorporate into Louisiana jurisprudence the federal law and federal jurisprudence arising under the Federal Trade Commission Act. In Guste v. Demars, 330 So. 2d 123 at 125 (La. App. 1st Cir. 1976), Louisiana's First Circuit Court of Appeal held that:

> The substantive prohibition of the Unfair Trade Practices and Consumer Protection Law is broad and does not specify particular violations... The language of this section tracks closely that of the Federal statute, 15 U.S.C. Section 45(a). Because of the variety of possible unfair and deceptive practices, the Federal statute was intentionally broadly written, leaving the determination of individual violations to the Commission and the courts. Our legislature has expressed a similar intention in patterning our law so closely on the Federal statute. Therefore, we may and should consider interpretations of the Federal courts and of the commission relative to such similar statutes to adjudge the scope and

application of our own statute. State, through Department of Highways v. Braddock, 170 So.2d 5 (La. App. 1st Cir. 1964)."

The Demars decision has been followed in the few cases which have confronted Louisiana courts with this question. See Moore v. Goodyear Tire and Rubber Co., 364 So.2d 630 (La. App. 2nd Cir. 1978) and Gour v. Daray Motor Co., Inc. and General Motors, Inc., 373 So.2d. 571 (La. App. 3rd Cir. 1979). Thus, it is established in Louisiana that any conduct that is made unlawful by section 5(a) (1) of the Federal Trade Commission Act and the rules and regulations of the Federal Trade Commission promulgated thereunder is also illegal under Louisiana's "Mini-F.T.C. Act."

Additionally, Louisiana courts have accepted by implication a second method of defining unfair or deceptive practices under the Louisiana act by "piggybacking" the Louisiana act on top of another state or federal statute in order to find an unfair trade

practice. Simply stated, a violation of another law constitutes a per se violation of the Louisiana Unfair Trade Practices and Consumer Protection Law.

In State v. Council of City of New Orleans, 309 So.2d 290 (La. 1975), the Attorney General attempted to have the ten per cent late payment charges imposed by the New Orleans Public Service, Inc., and approved by the New Orleans City Council, declared null and void and to have their levy and collection permanently enjoined. One theory relied on by the State was that the charge was usurious under Louisiana Civil Code Articles 1935 and 2924 and thus the charge was per se an unfair trade practice under the Louisiana Act. The Louisiana Supreme Court found that the late charge was not usurious and therefore held that no unfair or deceptive trade practice had been proved.

Similarly, in Faris v. Model's Guild, 297 So.2d 536 (La. App. 4th Cir. 1974), Judge Morial held unenforceable a contract entered into in violation of the licensing provision of the Louisiana Proprietary Schools Act, La. R.S. 17:3141.1 et seq. However, the court denied recovery under the Louisiana Unfair Trade Practice and Consumer Protection Law only because the plaintiff could prove no actual damages. The implication is that, had plaintiff been able to show actual damages, she would have received relief under the Act because of defendant's violation of another law.

Congress has delegated overall authority for the enforcement of the Truth In Lending Act, 15 U.S.C. 1600 et seq., to the Federal Trade Commission. Section 1607 (c) of the Truth In Lending Act provides in pertinent part:

> "...For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of

> any requirement imposed under this subchapter shall be deemed a violation of a requirement imposed under that Act..."

Thus, Congress has statutorily "piggy-backed" the Federal Trade Commission Act onto the Truth In Lending Act. Therefore, a Truth in Lending violation is also an unfair and deceptive trade practice made unlawful by 15 U.S.C. 45(a) (1). Consequently, it follows logically that a Truth in Lending violation is also unlawful under the Louisiana Unfair Trade Practice and Consumer Protection Law.

Considering the foregoing, the interest of the State of Louisiana, through her Attorney General, in these proceedings is clear. The decisions of federal courts regarding the Federal Trade Commission Act and the Truth In Lending Act have tremendous impact upon the interpretation, application, and enforcement of Louisiana's "Mini-F.T.C." Law. Therefore, amicus curiae submits that an authoritative interpretation of 15 U.S.C.

1635 and a final resolution of the questions presented by petitioners are essential for the guidance of the State of Louisiana, her Attorney General, her courts, her consuming citizens, and her business community when the consumer elects to exercise his right of recission granted by 15 U.S.C. 1635 (b).

ARGUMENT

The questions presented for review by the Lesters' petition for writ of certiorari raise significant issues under the Truth in Lending Act. An answer to these questions from this Honorable Court will reconcile conflicting lines of authority on the proper procedures for effecting a consumer's right to rescind a transaction under Section 1635 (b).

Section 1635 seems to provide, in clear and unambiguous language, a precise statutory scheme for recission.

Notwithstanding the apparent clarity of Section 1635, at least three (3) diverse lines of authority presently exist

regarding the mutual rights and obligations of the debtor and creditor when the debtor elects to rescind a transaction.

The first line of authority holds simply that if a creditor does not fulfill his duty to return property or money received from the debtor and to reflect termination of the security interest within 10 days of receipt of notice of recission, then the debtor need make no tender of the proceeds of the credit transaction and further that the debtor may keep those proceeds with no obligation to pay for same.

This view was first presented jurisprudentially by the Fifth Circuit in Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974). At least two (2) courts subsequently adopted the Sosa rule regarding creditor forfeiture as an incentive for compliance with Section 1635. Strader v. Beneficial Finance Company of Aurora, 551 Pac. 2d 720 (Col. Sup. Ct. 1976) and French v. Wilson, 446 F. Supp. 216

(U.S. D.C.R.I. 1978).

Additionally, on May 29, 1975, the Federal Reserve Board staff issued a Public Information Letter presenting its interpretation of the effect of a debtor's recission. Commerce Clearing House Credit Guide, Paragraph 31,230 (1974-1977 Trans Bind.) That letter bluntly states:

> "If the creditor fails within ten days to terminate any security interest and return the payments which he has received from the customer, he has by definition not fulfilled the requirements of the subsection, and Staff is of the opinion that the customer need make no tender of the proceeds to the creditor, retaining them without further obligation."

This Honorable Court's decision in Ford Motor Credit Company v. Milhollin, ____U.S. _____, 100 S.Ct. 790, ____L.Ed.2d _____ (1980) makes the Board letter even more persuasive. There this Court held that Federal Reserve Board staff opinions are controlling on questions of interpretation of the Truth In Lending Act and Regulation Z, so long as those opinions are not irra-

tional.

The second line of authority requires a full tender of the proceeds by the debtor at the same time that he gives notice of recission as a condition precedent for a creditor-forefeiture upon the creditor's failure to return property of the debtor and to reflect the termination of the security interest. If the debtor fails to tender the proceeds along with the notice of recission, the court still allows a recission but the creditor does not forfeit his right to recoup the proceeds of the transaction.

This second interpretation has been adopted by the Fifth Circuit subsequent to its decision in Sosa. See Gerasta v. Hibernia National Bank, 575 F.2d 580 (5th Cir. 1978); Harris v. Tower Loan of Mississippi, Inc., 609 F.2d 120 (5th Cir. 1980); and Bustamonte v. First Federal Savings & Loan Association, 619 F.2d 360 (5th Cir. 1980.

Finally, in the third interpretation, embraced by the Fourth and Ninth Circuits, the courts invoke their equity jurisdiction to condition recission itself on a prior debtor tender of the proceeds. Simply stated, if the debtor does not first tender the proceeds, there will be no recission at all and the credit transaction stands. Palmer v. Wilson, 502 F. 2d 860 (9th Cir. 1974); Ljepava v. M.L.S.C. Properties, Inc., 511 F. 2d 935 (9th Cir. 1975); Powers v. Sims & Levin, 542 F. 2d 1216 (4th Cir. 1976).

If in fact Congress intended an absolute creditor forfeiture without prior tender, then the decisions of the Fifth (excluding Sosa), Fourth, and Ninth Circuits have placed an unfair burden on the consumer. A requirement of tender prior to or concurrent with giving notice of recission eliminates the statutorily imposed stimulus for the creditor to take immediate action to clear title and fulfill his obligations.

On the other hand, if Congress did not intend an absolute creditor forfeiture without tender prior to or concurrent with notice of recission, then those jurisdictions which follow the rule of Sosa and the Board's staff opinion are giving the debtor an unauthorized and unjust windfall.

These conflicting interpretations by diverse authorities have created a state of confusion and uncertainty among consumers, extenders of credit, enforcement agencies, and the courts regarding the proper operation of the recission process. Until these conflicts are authoritatively resolved, the Truth in Lending Act's efficacy in enhancing economic stability and encouraging competition among extenders of consumer credit by the informed use of consumer credit will be diminished. Additionally, these conflicting interpretations harm the significant state and federal interests in maintaining certain and uniform expectations under the Truth in Lending Act, the Federal Trade Commission Act, and the various state "Mini-F.T.C. Acts."

SUMMARY OF ARGUMENT

At least three conflicting interpretations of 15 U.S.C. 1635 have been set forth by various federal courts, state courts and administrative agencies. The confusion created by these varying views has an unsettling effect on the enforcement of the Truth in Lending Act, the Federal Trade Commission Act, and the several state "Mini-F.T.C." acts by depriving consumers, extenders of credit, enforcement agencies, and courts of a uniform and certain rule of law to follow. This uncertainty is detrimental to the dual purposes of the Truth in Lending Act, as articulated by Congress, to enhance enonomic stability and to encourage competition among lenders.

CONCLUSION

The conflicting interpretations of 15 U.S.C. 1635 among the federal courts of appeals, the state courts and the Federal Reserve Board have made a certain and predictable enforcement scheme for the debtor's right of recission almost impossible. The instant petition for writ of certiorari has crystallized these conflicting interpretations of the same provision and thus provides this Honorable Court with the proper vehicle to finally resolve the issues of the mechanics of recission and of the mutual rights and obligations of the parties to the rescinded transaction. We therefore respectfully urge that the writ issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of this brief of the amicus curiae have been served upon respondent, Laura Anderson, Executrix of the Estate of R.C. Anderson, by depositing same in the United States Mail with first-class postage prepaid and properly addressed to her attorney of record, Russell E. Gahagan, Gahagan and Gahagan, Attorneys at Law, Post Office Box 70, Natchitoches, Louisiana 71457.

I further certify that three copies of this brief of the amicus curiae have been served upon petitioners, Donald E. Lester, Jr. and Sue Furger Lester, by depositing same in the U.S. Mail with first-class postage prepaid and properly addressed to their attorney of record, Henry B. Bruser III, Gold, Little, Simon, Weems & Bruser, Post Office Box 6118, Alexandria, Louisiana 71301.

Baton Rouge, Louisiana, this 21st day of October, 1980.

CATHERINE L. STAGG

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No. 80-495

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. LESTER, JR., AND
SUE FURGER LESTER, PETITIONERS

v.

LAURA ANDERSON, EXECUTRIX OF THE
ESTATE OF R.C. ANDERSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Section 125(a) of the Truth in Lending Act (15 U.S.C. 1635(a)) grants a right of rescission to a consumer in certain credit transactions. Section 125(b) of the Act (15 U.S.C. 1635(b)) provides that when the consumer exercises his right to rescind, the creditor is required to return to the consumer all monies received and terminate any security interest arising from the credit transaction. The consumer is thereupon required to tender the loan proceeds back to the creditor.

The questions presented are:

1. Whether a creditor who does not return all monies received from a rescinding consumer forfeits his right to recover the loan proceeds from the consumer where the consumer fails to tender the loan proceeds back to the creditor.

2. Whether a creditor in such circumstances is liable to the consumer for actual damages, civil penalties, and attorney's fees.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

A. The Statute

The Truth in Lending Act (15 U.S.C. 1601 *et seq.*, the "Act") provides that a consumer who enters a credit transaction in which the creditor obtains a security interest in the consumer's home may rescind the transaction within three days after it is consummated (15 U.S.C. 1635(a)). In addition to the disclosures the Act requires in all consumer credit transactions,[1] Section 1635(a) requires the creditor to

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[1]See 15 U.S.C. 1639 and Regulation Z (12 C.F.R. 226.8).

disclose that the consumer has the right to rescind a transaction that is subject to that provision. If the creditor does not disclose the consumer's right to rescind at the time the transaction is consummated, the consumer has the right to rescind until the creditor makes the required disclosure, but that right expires three years after consummation (Section 1635(a), (f)). The consumer may exercise his right to rescind by notifying the creditor of his intention to rescind (Section 1635(a)).

Section 1635(b) sets forth the procedures that apply when a consumer exercises his right to rescind, and "is designed to restore the parties to the status quo as closely as possible." *Bustamante* v. *First Federal S. & L. Ass'n*, 619 F. 2d 360, 365 (5th Cir. 1980). When the consumer notifies the creditor of his intention to rescind, he is no longer liable for any finance charge and the security interest in his home becomes void. Section 1635(b) then requires the creditor, within ten days after receiving the notice of rescission, to return all money received from the consumer and to take all necessary action to terminate any security interest created by the transaction. Upon the creditor's performance of these obligations, the consumer is required to tender any property received from the creditor. If the creditor does not take possession of the property within ten days of the tender, ownership of the property vests in the consumer and he is not obliged to pay for it.

The Act specifies the remedies and civil penalties that may be awarded against creditors who violate its provisions. 15 U.S.C. 1640.[2] The creditor who fails to comply with the Act's requirements is liable to the consumer for

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[2]The Act also imposes criminal liability for willful violations (see 15 U.S.C. 1611). That provision, however, is not involved here.

actual damages resulting from the failure (Section 1640(a)(1)), a civil penalty of twice the amount of the finance charge (not less than $100 or more than $1,000) (1640(a)(2)), and in a successful action to enforce the liability Section 1640(a) imposes, attorney's fees and costs (Section 1640(a)(3)). Any action to enforce the liability Section 1640(a) creates must be brought within one year from the date of the violation. 15 U.S.C. 1640(e).

B. The Facts of this Case

In January 1975, petitioners borrowed $70,000 from respondent's decedent (hereinafter "respondent") and gave him their promissory note for $77,000 that was secured by a mortgage on their home (Pet. App. A-1). After paying approximately $9,000 on the loan, petitioners defaulted and respondent brought suit for payment in the Tenth Judicial District Court for the Parish of Natchitoches, Louisiana (Pet. App. A-3). In response, petitioners claimed, *inter alia*, that respondent had violated the Truth in Lending Act by failing to disclose the existence of their right of rescission[3] and sought actual damages for the violation, as well as civil penalties and attorney's fees (Pet. App. A-1, A-37 to A-38). They also notified respondent that they were rescinding the transaction (Pet. App. A-3 to A-4). Upon receipt of petitioners' notice of rescission, respondent neither returned the payments petitioners had made on the loan, nor did he take any action to terminate his security interest in their home, as required by the Act, 15 U.S.C. 1635(b). Instead, he continued to prosecute his suit for payment (Pet. App. A-4). Petitioners never tendered the loan proceeds to respondent (Pet. App. A-20).

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[3]It is undisputed that the transaction is a consumer credit transaction subject to the rescission provisions of Section 1635, and that respondent made none of the disclosures required by the Truth in Lending Act.

The trial court dismissed respondent's suit against petitioners, rescinded the loan, cancelled respondent's security interest in petitioners' home, and ordered respondent to return to petitioners the loan payments they had made (Pet. App. A-27 to A-28). It also held that respondent forfeited the entire proceeds of the loan he had advanced to petitioners (Pet. App. A-31), and awarded petitioners $1,000 each in civil penalties for respondent's "failure to make the required disclosures," and $10,000 for attorney's fees (*ibid.*).

On respondent's appeal to the Louisiana Court of Appeal, Third Circuit, that court upheld the trial court's rulings ordering respondent to return to petitioners the payments they had made on the loan and to cancel his security interest in their home (Pet. App. A-24 to A-25). The court of appeal, however, reversed the trial court's holding that respondent forfeited the entire loan proceeds. It concluded that petitioners' failure to tender the loan proceeds made the forfeiture provision of Section 1635(b) inoperative (Pet. App. A-19 to A-20). It therefore ordered petitioners to tender to respondent the amount of the loan proceeds ($70,000) within 30 days of respondent's performance of his repayment and cancellation obligations and held that if respondent did not accept the tender within ten days, petitioners could keep the money (Pet. App. A-25).

The court of appeal also reversed the trial court's award in favor of petitioners of civil penalties and attorney's fees. It held that those claims were barred because they were not made within one year of respondent's failure to make the required disclosures, as required by 15 U.S.C. 1640(e) (Pet. App. A-20 to A-22).

DISCUSSION

1. *Forfeiture.* The decision below correctly held that under the Truth in Lending Act a creditor does not forfeit his

property to a rescinding consumer where the consumer fails to tender the property received from the creditor.

a. The Act provides that when a consumer in a credit transaction exercises his right to rescind, the creditor is required to return to the consumer all monies received and terminate any security interest arising from the credit transaction (15 U.S.C. 1635(b)). The consumer is thereupon required to tender the loan proceeds to the creditor. Neither Section 1635(b) nor Regulation Z (12 C.F.R. 226.9(d)) specifies the consequences arising from a creditor's failure to perform the duties Section 1635(b) requires on receipt of a rescission notice and the consumer's failure to tender the creditor's property. The courts, however, have held that where a creditor fails to comply with the requirements of Section 1635(b), the consumer can file an action for damages, civil penalties, and attorney's fees pursuant to Section 1640 of the Act.[4] *Gerasta* v. *Hibernia Nat'l Bank*, 575 F. 2d 580, 583 (5th Cir. 1978).

In ruling on consumers' separate claims to enforce their right to rescission pursuant to Section 1635, the courts have examined the underlying purpose of the statute in order to determine under what circumstances a creditor forfeits its property for failing to comply with the requirements of the section. That purpose is to return the parties to the *status*

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[4]Section 1640(a) provides a "remedy for a creditor's failure to comply with 'any requirement' imposed by certain provisions of the Act, including §1635." *Gerasta* v. *Hibernia Nat'l Bank*, 575 F. 2d 580, 583 (5th Cir. 1978).

The Truth in Lending Simplification and Reform Act amends Section 1640(a) to provide that a creditor is liable for failing to comply with any requirement imposed by the Act " 'including any requirement under section [1635]' " (Pub. L. No. 96-221, Section 615(b)(1), 94 Stat. 181), and amends Section 1640(c) to authorize the award of attorney's fees " 'in any action in which a person is determined to have a right of rescission under section [1635]' " (Pub. L. No. 96-221, Section 615(a)(2), 94 Stat. 180).

quo ante if the consumer elects to rescind within the time prescribed by the Act. Requiring the consumer to tender the creditor's property to trigger the forfeiture provision of Section 1635(b) "is the correct means to insure compliance with the congressional purpose of restoring the parties to the *status quo*." *Bustamante* v. *First Federal S. & L. Ass'n*, 619 F. 2d 360, 365 (5th Cir. 1980). Thus, the decision below requiring petitioners to tender the loan proceeds if respondent performs his repayment and cancellation obligations is entirely consistent with the purpose of the Act to restore the parties to their position prior to the loan transaction.

b. Contrary to petitioners' contention (Pet. 27), the decision below does not conflict with any other appellate court ruling. Rather, the federal courts of appeals have consistently declined to impose forfeiture upon the creditor to a rescinding consumer in the absence of a tender of the property to the creditor. For example, in *Sosa* v. *Fite*, 498 F. 2d 114 (5th Cir. 1974), upon which petitioners rely (Pet. 12-14), the consumer expressly offered to return the property at the time she notified the creditor of her intent to rescind the credit transaction but the creditor failed to respond to the offer (498 F. 2d at 118). As a result, the court held that the creditor had forfeited its property, noting that the consumer's "obligation to restore the creditor to the *status quo ante* was discharged by an offer accompanying notice of rescission * * *" (*id.* at 119).[5] The decisions of other

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[5]Petitioners erroneously characterize the reference in *Sosa* to the consumer's offer to return the property as "dicta" (Pet. 15). Indeed, in subsequent cases, the Fifth Circuit has emphasized that the decision in *Sosa* was based on the consumer's offer to return the property. See *Gerasta* v. *Hibernia Nat'l Bank*, *supra*, 575 F. 2d at 584.

Petitioners also cite (Pet. 17-18) two cases that have relied on *Sosa* v. *Fite*, for the proposition that a creditor forfeits its property to the consumer by failing to comply with Section 1635(b)'s requirements within ten days after receiving notice of rescission. In *Strader* v. *Beneficial Finance Co. of Aurora*, 551 P. 2d 720 (Colo. 1976), the Supreme

courts of appeals cited by petitioners are to the same effect. In each case, the courts invoked their equitable powers to condition rescission on the consumer's tender of the consideration received as a result of the credit transaction.[6]

Nor does the decision below conflict with the views of the staff of the Federal Reserve Board (Pet. 9-11). The 1975 unofficial staff interpretation relied on by petitioners (Pet. App. A-45)[7] did not directly address the question presented

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Court of Colorado held that the creditor forfeited loan proceeds to the consumers by failing to perform the duties imposed by a state statute similar to Section 1635(b). The court noted, however, that, as in *Sosa*, the consumers had tendered the creditor's property. 551 P. 2d at 726. Contra: *French* v. *Wilson*, 446 F. Supp. 216 (D. R.I. 1978). Although the district court in *French* cited *Sosa* as authority for imposing "the rather harsh legislative remedy" of forfeiture upon a creditor who failed to respond to a consumer's notice of rescission (*id.* at 220) we believe that it reached an erroneous result that is not supported by the facts of *Sosa*.

[6]Thus, in *Powers* v. *Sims & Levin*, 542 F. 2d 1216 (4th Cir. 1976) the consumers told the creditor they would not return all the consideration they received. The court, however, conditioned rescission on their tender of all the consideration, explaining that nothing in Section 1635 "limits the power of a court of equity to circumscribe the right of rescission to avoid the perpetration of stark inequity * * *" (542 F. 2d at 1221).

Similarly, in *Palmer* v. *Wilson*, 502 F. 2d 860 (9th Cir. 1974); *Ljepava* v. *M.L.S.C. Properties, Inc.*, 511 F. 2d 935 (9th Cir. 1975); and *LaGrone* v. *Johnson*, 534 F. 2d 1360 (9th Cir. 1976), the Ninth Circuit sanctioned decrees conditioning the grant of rescission (and the resulting loss of the creditors' security interest) on the consumers' tender of the loan proceeds, where the consumers appeared to be financially incapable of returning those proceeds after rescission. But see *Rachbach* v. *Cogswell*, 547 F. 2d 502 (10th Cir. 1976) (holding that in the absence of a trial transcript, the trial court's findings had to be accepted as true and that the district court did not abuse its discretion in refusing to condition rescission on the consumer's payment of the balance of the loan).

[7]The letter was an unofficial staff interpretation of Regulation Z (12 C.F.R. 226.9(d)), and thus is not entitled to the degree of deference accorded official staff opinions and interpretations. See *Ford Motor*

in this case.[8] Moreover, the Board's staff believes that a court, as in this case, has discretion to modify the rescission procedures of Section 1635(b) as long as the modification is consistent with the statutory purpose of restoring the *status quo ante*. If petitioners were permitted to keep the loan proceeds, have respondent's security interest cancelled, and recover all monies paid to respondent, the *status quo ante* would not be achieved. On the contrary, it would result in petitioners' unjust enrichment.

Finally, the decision in this case is also consistent with the recently enacted Truth in Lending Simplification and Reform Act. In that statute, Congress amended Section 1635(b) to provide that " '[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court.' "[9] Under the amended Section 1635(b), therefore, Congress expressly has authorized courts to exercise

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Credit Co. v. *Milhollin*, 444 U.S. 555 (1980). The Board's staff did not begin to issue official interpretations until August 1976, pursuant to the procedures established in 12 C.F.R. 226.1(d), which became effective on July 30, 1976 (41 Fed. Reg. 28256). We are advised by the Board that its staff issued only informal, unofficial letter opinions concerning the Act and Regulation Z and designated those it believed significant as Public Information Letters. The letter cited by petitioners was not so designated.

[8]The paragraph of the letter on which petitioners rely does not address the situation where, as here, the consumer seeks both to enforce this right to rescind and to keep the creditor's property without first tendering it. That situation is addressed in the succeeding paragraph of the letter, which suggests that the consumer may not be entitled to do so (Pet. App. A-46).

[9]Pub. L. No. 96-221, Section 612(a)(4), 94 Stat. 175.

The Senate Report accompanying the proposed legislation explained this provision as follows (S. Rep. No. 96-73, 96th Cong., 1st Sess. 15 (1979)):

> Upon application by the consumer or the creditor, a court is authorized to modify this section's procedures where appropriate. For example, a court might use this discretion in a situation where

the discretion they already have been exercising in determining how the parties to a rescinded credit transaction must satisfy their respective obligations. Hence, petitioners' forfeiture claim has no continuing importance under the Truth in Lending Act.

2. *Civil penalties and attorney's fees.* Petitioners further contend (Pet. 26-27) that the court below erred in failing to award them civil penalties and attorney's fees for respondent's failure to perform his repayment and cancellation obligations. Had they asserted that claim, petitioners might well have prevailed, because the Act provides for the award of civil penalties and attorney's fees for a creditor's failure to comply with the requirements in Section 1635(b) (see page 5, note 4, *supra*). Petitioners, however, appear to have based their claim for civil penalties and attorney's fees in the courts below only on respondent's failure to make the disclosures the Act requires and not on his failure to comply with his obligations under Section 1635(b) (Pet. App. A-37 to A-38). Accordingly, the trial court awarded each petitioner civil penalties "for [respondent's] failure to make the required disclosures" (Pet. App. A-31) and attorney's fees "as allowed by the Truth and [sic] Lending Law" (*ibid.*). Nothing in the opinion of the court of appeal suggests that petitioners advanced or that the court considered a new claim based on respondent's failure to perform his obligations under Section 1635(b). Rather, the court correctly held that the claim that petitioners had advanced in the trial court was barred by the one-year statute of limitations in

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a consumer in bankruptcy or wage earner proceedings is prohibited from returning the property. The committee expects that the courts, at any time during the rescission process, may impose equitable conditions to insure that the consumer meets his obligations after the creditor has performed his obligations as required under the act.

Section 1640 (Pet. App. A-20 to A-22).[10] Since this Court does not "extend [its] review beyond those specific federal questions properly raised in the state court" (*Ker* v. *California*, 374 U.S. 23, 43-44 (1963)), there is no basis for review of petitioners' claim to civil penalties and attorney's fees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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[10]Petitioners apparently conceded in the court of appeal that their claim for civil penalties was barred by the statute of limitations (Pet. App. A-21).

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